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Trying to Make Peace with Bush v. Gore

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TRYING TO MAKE PEACE WITH *BUSH V. GORE*

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TRYING TO MAKE PEACE WITH *BUSH V. GORE*

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I. INTRODUCTION: THE SETTING AND THE ISSUES

The Supreme Court's decision in *Bush v. Gore*, shutting down the recounts of Florida's vote in the 2000 presidential election and effectively awarding the election to George W. Bush, has struck many observers, including myself, as outrageous.¹ Decisions of the Supreme Court should be more than mere reflections of ideological or partisan preference thinly camouflaged behind legalistic language. It would therefore be pleasant to be able to believe that they *are* more than that. Accordingly, Judge Richard Posner's analysis,² in which he de-

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1. See, e.g., Richard D. Friedman, *Bush v. Gore: What Was the Supreme Court Thinking?*, COMMONWEAL, Jan. 12, 2001, at 10; Jeffrey Rosen, *Disgrace*, NEW REPUBLIC, Dec. 25, 2000, at 18-21.

2. RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (Dennis J. Hutchinson et al. eds., 2001) [hereinafter

fends the result reached by the Court—though not the path by which it got there—is particularly welcome. Though Judge Posner is a person of conservative political orientation, he is also fiercely independent-minded. Given that he sees merit in the *Bush* decision, then perhaps we can give more credence to the proposition that—whether ultimately we agree with the decision or not—it was a plausible response to a difficult situation, rather than a flagrant act of judicial usurpation.

Ultimately, indeed, I am not persuaded by the arguments made by Judge Posner and others who have defended the *Bush* result as a prudential exercise of judicial power. In this article I will explain why I still believe the Court was wrong, way wrong. But I believe that Judge Posner and others have made a better argument for the Court's result than the Court did itself. In particular, an argument under Article II of the Constitution, which only three members of the Court adopted, is stronger than the holding under the Equal Protection Clause that a majority of the Court adopted. I will attempt in this article to recast the Article II argument to make it even stronger; in my formulation, it is irrelevant whether the Florida Supreme Court relied exclusively on acts of the legislature in ordering recounts but significant whether that decision was a plausible application of preexisting law. I remain unpersuaded that even this reformulated argument should have led to a shutdown of the Florida recount. I draw this conclusion in part because the Florida Supreme Court's recount order seems clearly to have satisfied this standard. More fundamentally, the entire matter should have been left, as far as federal institutions are concerned, to the political process prescribed by the Constitution and by federal statute. Thus, I continue to regard the Court's intervention as a terrible mistake inimical to our democracy—guided in part by a partisan motivation that I hope was not close to the surface of judicial consciousness and in part by a misplaced sense that the nation was on the verge of chaos. And yet my sense of outrage is ever so slightly muted. I can at least see how a Justice with a perspective affected by a strong Republican rooting interest might in good faith have regarded the decision of the Florida Supreme Court as intolerable and so been tempted to step in.

A brief summary of the situation as it stood on December 8, 2000, will help the reader understand the issues in *Bush v. Gore* and the plan of this article. The Secretary of State had certified the Republican ticket as the winners of Florida's electors, but on December 8 the Florida Supreme Court ordered a statewide manual recount of the

POSNER, BREAKING THE DEADLOCK]; Richard A. Posner, *Florida 2000: The Election Deadlock and the Litigation That Ensued*, 2000 SUP. CT. REV. 1 (2001) [hereinafter Posner, *Florida 2000*].

undervote—that is, of those ballots containing no markings registered by the counting machines in the presidential vote.³ Governor (now President) Bush immediately petitioned the United States Supreme Court to review that decision.

There was considerable doubt as to whether such a recount could be completed in time to determine Florida's electoral votes. A federal statute, 3 U.S.C. § 5, offered the state a "safe harbor"—if by December 12 it finally resolved its contest proceeding in the manner prescribed previously by state law, then the determination made by that proceeding should have been immune from challenge under state law. But the deadline for the safe harbor was only four days away. Six days after that, December 18, was the date prescribed by law for the casting of electoral votes, in accordance with the requirement of Article II of the Constitution that the electoral votes be cast on the same day in every state. A statute provided that the electoral votes would be counted on January 6,⁴ and under the Twentieth Amendment to the Constitution the new President was due to be inaugurated on January 20.⁵

Beyond timing was the question whether the recount ordered by the Florida court was constitutionally valid. Governor Bush was raising two principal contentions. One was that the recount violated the Fourteenth Amendment, mainly because the court had failed to establish uniform standards more specific than "the intent of the voter" for determining whether a ballot recorded by the machines as an undervote should be deemed to have cast a valid vote. The other was that the state supreme court's decision ordering the recount was not based on a valid interpretation of Florida election law, as enacted by the legislature, and therefore it violated Article II of the Constitution. Meanwhile, complicating the situation, the Republican-dominated legislature was prepared to step into the situation and designate its own slate of electors.

Part II of this article will take up first (in large part because it is most easily detachable from other issues) the suggestion that at some point after Election Day the Florida Legislature could have picked a slate of electors or prescribed a method to pick them. I believe that the legislature quite clearly had no such authority.

In Part III, I address the question of deadlines. As others have recognized, Florida law did not clearly preclude the state from continuing any recount beyond December 12, whatever the circumstances. Beyond that, I contend that Judge Posner is incorrect in as-

3. THE WASHINGTON POST, DEADLOCK: THE INSIDE STORY ON AMERICA'S CLOSEST ELECTION 53 (Leonard Downie Jr. et al. eds., 2001) [hereinafter WASHINGTON POST].

4. See 3 U.S.C. § 15 (1994).

5. U.S. CONST. amend. XX, § 1.

suming, as apparently the dissenters in *Bush v. Gore* did, that determination of which slate of electors Florida voters had selected needed to be completed by December 18, the date prescribed by federal law for electors to vote. In fact, though a timely determination of that matter by Florida would have simplified matters, Florida did not have to make a determination at all. The electors had to vote on December 18, but there is no bar against two slates voting on that date, with the matter to be resolved later. If the matter was unresolved before it came to Congress, then resolution would have been Congress's responsibility.

Part IV agrees with and amplifies Judge Posner's conclusion that the Fourteenth Amendment argument accepted by a majority of the Supreme Court was very weak and that it did not fit well with the shutdown of the recount ordered by the Court.

Part V examines the structure of the Article II argument, on which Judge Posner and other conservative jurists wish a majority of the Court had relied.⁶ I agree with them, and with the three members of the Court who would have decided the case on this ground, that a decision like that of the Florida Supreme Court requiring manual recounts does raise an Article II issue. But instead of emphasizing whether the Florida Supreme Court relied on sources other than legislation, or on whether the decision of that court was a usurpation of legislative authority, the critical Article II issue in this case depends on whether the decision of that court was a plausible one given the state of preexisting law.

The Article II argument nevertheless should not have prevailed. In Part VI, I contend that the Florida court's decision to order recounts easily satisfied this plausibility standard. More fundamentally, in Part VII, I argue that the entire matter should have been left to the political process prescribed by the Twelfth Amendment to the Constitution and by federal statute. At the most fundamental level, my disagreement with Judge Posner comes down to this: He believes that the Supreme Court made a wise and pragmatic decision to foreclose the possibility of a national crisis by intervening and shutting down the postelection process.⁷ I believe that the decision was an unnecessary and anti-democratic arrogation of power that prevented the election from being decided by the preordained political process, which may have been long and contentious but which

6. See, e.g., Robert H. Bork, *Sanctimony Serving Politics: The Florida Fiasco*, THE NEW CRITERION, Mar. 2001, at 2-4, available at <http://www.newcriterion.com/archive/19/mar01/bork.htm>; Charles Fried, 'A Badly Flawed Election': An Exchange, N.Y. REV. OF BOOKS, Feb. 22, 2001, available at <http://www.nybooks.com/articles/14004>.

7. That *Bush v. Gore* was an exercise of legal pragmatism, and that this is a virtue of the decision, are major themes of Judge Posner's book. See POSNER, BREAKING THE DEADLOCK, *supra* note 2, at 185-89.

would have produced a President without a breakdown in civil order. A pragmatic judge should accord an extremely high priority to the need to preserve democratic procedures for selection of the nation's leaders. In *Bush v. Gore* the Supreme Court failed to do so.

II. THE POSTELECTION ROLE OF THE LEGISLATURE

As the postelection battle dragged on, the Florida Legislature was poised to select its own slate of electors and presumably would have done so had the United States Supreme Court not put an end to the matter. Judge Posner believes that the Legislature may have had the authority to do so.⁸

Such authority would be based on Article II of the Constitution, which provides that “[e]ach state shall appoint” electors “in such Manner as the Legislature thereof may direct,” and on 3 U.S.C. § 2, which provides:

Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.⁹

On examination, though, it becomes quite clear that the legislature has no authority *after* the election to devise a new plan for selecting electors or to select them itself.

Article II provides that Congress may determine a uniform date for all electors to be selected throughout the nation.¹⁰ Congress did so in 1845, providing a national election day for the first time—then as now the first Tuesday after the first Monday in November.¹¹ In considering the statute, however, Congress realized it had a problem: at least one state, New Hampshire, then provided that a majority of voters was necessary to select a slate of electors. Thus, as a Congressman from that state pointed out, “it might so happen that no choice might be made” on Election Day.¹² To preclude this result, Congress included in this one-paragraph statute the provision now

8. POSNER, BREAKING THE DEADLOCK, *supra* note 2, at 55 (speaking of “options that [Bush] possessed to thwart a recount that went against him, notably the option of the Florida legislature’s appointing its own slate of presidential electors”); Posner, *Florida 2000*, *supra* note 2, at 5 (similar); *see also* POSNER, BREAKING THE DEADLOCK, *supra* note 2, at 133 (“At some point continued uncertainty about the outcome of the November 7 election might be deemed a failure to have chosen electors on that day, in which event the Florida legislature could select its own slate . . .”); Posner, *Florida 2000*, *supra* note 2, at 43 n.69 (similar).

9. 3 U.S.C. § 2 (1994).

10. U.S. CONST. art. II, § 1, cl. 3 (“The Congress may determine the Time of chusing the Electors . . .”).

11. Act of Jan. 23, 1845, 5 Stat. 721 (1845) (codified at 3 U.S.C. § 1 (1994)).

12. CONG. GLOBE, 28th Cong., 2d Sess. 14 (1844) (remarks of Rep. Hale).

codified immediately afterward as 3 U.S.C. § 2.¹³ If the state holds an election on the prescribed day but “fail[s] to make a choice,” it does not forfeit its electors; rather, it may hold a runoff on a later day.¹⁴

The statute cannot reasonably be understood to have meant that if the state holds an election on Election Day but it turns out that the result is really, really close and takes some time to resolve, then the Legislature may step in and choose a slate of electors without regard to what happened on Election Day.¹⁵ No one in Congress suggested that this was the intent or meaning of the statute. Elections are often very close and not resolved on Election Day; indeed, in 2000 Florida was not the only state in which the outcome remained in doubt until well after November 7. That the winner has not been determined conclusively by midnight on Election Day, only a few hours after the polls close, or even by a much later time, does not mean the state has failed to make a choice on that day. It only means that the responsible state officials have not yet ascertained what choice the people of the state made on Election Day.

Certainly the 1845 statute sets out no standard or procedure for determining whether an election is so close or difficult to determine that the people of the state should be deemed to have “failed to make a choice” on Election Day.¹⁶ Thus, if § 2 were deemed to authorize a legislature to pick a slate of electors whenever the election was too close to call, any time that a legislature purported to exercise this authority supporters of the losing candidate would be sure to contend that the decision was a usurpation of power, because the winner of the election might yet have been determined in good order. This is a recipe for chaos.¹⁷

13. See *id.* (remarks of Rep. Hale, suggesting “that provision might be made for such a contingency”); *id.* at 21 (sponsor offering amended bill, providing for contingency, in terms substantially similar to those now in 3 U.S.C. § 2).

14. 3 U.S.C. § 2 (1994).

15. Though I regret to say I suggested earlier, in a CNN chatline conducted before I understood the background of the statute, that such a theory might be valid. *Law Professor Richard Friedman: The Latest on the Election 2000 Legal Proceedings* (Dec. 7, 2000), available at <http://www.cnn.com/community/transcripts/2000/12/7/friedman/> (on file with author). Live and learn. I am grateful to Professor Kenneth Katkin, whose e-mail of December 7, 2000, to a discussion list for constitutional law professors, on file with the author, set me straight.

16. The gap cannot be filled by construing the “safe harbor” provision, 3 U.S.C. § 5 (1994), to set a time after which section 2 authorizes the legislature to choose electors; section 5 was not enacted until 42 years after section 2, in the Electoral Count Act of Feb. 3, 1887, 24 Stat. 373.

17. Note that Congress rejected an amendment to the Election Day bill that, as one member described it, would have given “concurrent jurisdiction” to the electors of a given state and to the legislature to fill vacancies among the electors; as that member said, “those two bodies being of different political opinions, the election might be negated entirely, and no election take place.” CONG. GLOBE, 28th Cong., 2d Sess. 15 (1844).

The essential point of the 1845 statute was to create a uniform national election day. It would make no sense—either in advancing that goal or in achieving any sense or perception of fairness—to provide that, just because an election contest could not be resolved quickly, a legislature could nullify the election and select the state’s electors itself.¹⁸ Section 2 should be construed as limited to the contingency that called it forth: if a state selects its electors by popular election but requires more than a simple plurality for the selection, then there is a chance that the election held on Election Day will produce no winner, and so notwithstanding Congress’s attempt to provide for a uniform election day, the state may in that case hold a subsequent proceeding to select its electors.

III. DEADLINES

Under Article II of the Constitution, electors throughout the nation must cast their votes on a single day, chosen by Congress.¹⁹ The date prescribed by Congress—perhaps with a touch of whimsy?—is “the first Monday after the second Wednesday in December” after the election,²⁰ which in 2000 was December 18. Under another statutory provision, 3 U.S.C. § 5, if before Election Day a state provides a procedure “for its final determination of any controversy or contest” concerning the appointment of electors and that determination is made at least six days before the time fixed by law for the meeting of the electors, then the determination is conclusive when the electoral votes are counted before Congress.²¹ Thus, December 12 was the deadline for Florida to conclude its contest if it was to take advantage of this “safe harbor.” Finally, 3 U.S.C. § 15, which provides for the counting of the electoral votes by Congress, set January 6, 2001, as the date for the count to commence.²²

So, then: By when did Florida have to decide who—so far as it was concerned—had won the state’s electors? It is obvious that, so far as

18. At the time of the statute, the electors of one state, South Carolina, were still chosen by the state’s legislature. The sponsor of the bill made it clear that, though the prior practice of the legislature had been to meet in December, the legislature would have to be in session to choose electors on the designated day. *See* CONG. GLOBE, 28th Cong., 2d Sess. 14 (1844) (statement of Rep. Duncan) (“[N]o difficulty could occur in [South Carolina], for its legislature could be convened every fourth year on the day to be fixed by the bill, to discharge the duties therein prescribed.”); *see also, e.g., id.* at 28 (Rep. Campbell of South Carolina).

19. “The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.” U.S. CONST. art. II, § 1, cl. 3.

20. 3 U.S.C. § 7 (1994).

21. *Id.* § 5.

22. *Id.* § 15. January 6 is the standing date provided by the statute. Occasionally, Congress has passed special statutes selecting another date for a given count, *see, e.g., id.* (Supp. V 1999), but this time around it stayed with the standing date.

federal law is concerned, Florida did not have to make a decision by December 12. By its terms, § 5 gives the state an option: *If* a process prescribed by the state complies with the terms of the statute, one of which is the deadline, then the determination yielded by that process is conclusive in the count of the electoral vote. If the state does not satisfy the statute, it does not forfeit its electoral votes. Rather, that simply means that the determination of the winner of the state's electors is contestable in Congress. Section 15 provides a rather elaborate procedure, which I shall discuss in Part VII, for resolving the contest in that case.

It does appear that the Florida Supreme Court, without confronting the issue, operated under the assumption that Florida law required adherence to the December 12 deadline, at least in the ordinary instance.²³ Chief Justice Wells of the Florida Supreme Court, dissenting from the court's order requiring a statewide recount, thought it clear that the majority was insisting on December 12 as a deadline.²⁴ And the United States Supreme Court, making a rather expansive reading of vague language from the Florida court's opinion of November 21,²⁵ treated the matter as if Florida law were not only

23. Perhaps the strongest expressions of the Florida court on this matter came in *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273 (Fla. 2000), after remand from the Supreme Court. The Florida court said:

What is a reasonable time required for completion [of a manual recount] will, in part, depend on whether the election is for a statewide office, for a federal office, or for presidential electors. In the case of the presidential election, the determination of reasonableness must be circumscribed by the provisions of 3 U.S.C. § 5, which sets December 12, 2000, as the date for final determination of any state's dispute concerning its electors in order for that determination to be given conclusive effect in Congress.

Id. at 1286 n.17. And later in its opinion, the court said:

As always, it is necessary to read all provisions of the elections code in *pari materia*. In this case, that comprehensive reading required that there be time for an elections contest pursuant to [Florida Statutes] section 102.168, which all parties had agreed was a necessary component of the statutory scheme and to accommodate the outside deadline set forth in 3 U.S.C. § 5 of December 12, 2000.

Id. at 1290 n.22; *see also infra* note 25 (reference to failure to comply with § 5 as preventing full participation of Florida voters in election). The United States Supreme Court did not cite these passages in *Bush v. Gore*—perhaps because the Florida court's opinion was issued just a day before *Bush*.

24. *Gore v. Harris*, 772 So. 2d 1243, 1268 (Fla. 2000) (Wells, C.J., dissenting), *rev'd sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000) ("The safe harbor deadline day is December 12, 2000. Today is Friday, December 8, 2000. Thus, under the majority's time line, all manual recounts must be completed in five days, assuming the counting begins today.").

25. The Florida court said that excluding late returns was proper only if including them would "compromise the integrity of the electoral process," which it could do in two ways, one of them "by precluding Florida voters from participating fully in the federal electoral process." *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1237 (Fla. 2000), *vacated sub nom.* *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000). The court then cited generally 3 U.S.C. §§ 1-10, without specifying or discussing the "safe harbor" provision. *Id.* at 1237 n.55. In its decision of December 8, however, the court spoke more specifically, referring to the Department of State's discretion to reject late-amended

clear but absolute on the matter. When the election dispute first reached the Court, the Justices had punted the case back to the Florida court, professing uncertainty in *Bush v. Palm Beach County Canvassing Board* (“*Bush I*”) as to the basis for the Florida court’s opinion.²⁶ Eight days later, on December 12 in *Bush v. Gore* (“*Bush II*”),²⁷ having held that the recount as ordered by the Florida court was constitutionally defective, the Court showed no such reticence. The Florida Supreme Court had decided that December 12 was the deadline, that date had come, and so it was impossible to complete a valid recount in a timely manner.²⁸ Game over. The Court did not bother to ask the Florida court to determine whether that court construed Florida law to make qualification for the safe harbor the preeminent goal, so that, if the only way to conduct a constitutionally permissible recount required abandonment of that goal, the recount could not be held. It is at least plausible that, given the chance, the Florida court would have held that manual recounts, for which the Florida election code provides in extensive detail,²⁹ took precedence over the safe harbor, which the election code does not even mention.

Judge Posner also finds the Supreme Court’s invocation of the December 12 deadline unpersuasive and even distasteful, decrying its “‘Gotcha!’ flavor.”³⁰ But he suggests that December 18 was in fact the deadline for Florida to resolve the dispute over selection of its electors. The *Bush II* dissenters appear to agree, as does Charles Fried.³¹ I do not.

All electors had to *vote* on December 18, because the Constitution says that the date for electors to vote shall be the same throughout the nation and that is the date that Congress selected.³² But this does not mean that any provision of federal law required that the electors be *certified* by that date as having been elected. Usually, of course, certification occurs well before that date. Indeed, 3 U.S.C. § 6 provides that it “shall be the duty” of the executive of the state “as soon

returns if failure to do so would “result in Florida voters not participating fully in the federal electoral process, as provided in 3 U.S.C. § 5.” 772 So. 2d at 1290.

26. 531 U.S. at 78.

27. 531 U.S. 98 (2000).

28. *Id.* at 110.

29. FLA. STAT. § 102.166 (2000), *amended by* 2001 Fla. Laws ch. 40, § 42, at 149-52.

30. POSNER, BREAKING THE DEADLOCK, *supra* note 2, at 150-51 (“The remedy decreed by the five-Justice majority . . . has a ‘Gotcha!’ flavor, as if the U.S. Supreme Court had outsmarted the Florida supreme court by nailing that court with its perhaps unconsidered suggestion that December 12 was indeed the deadline under Florida law for designation of the state’s electors . . .”); Posner, *Florida 2000*, *supra* note 2, at 48 (similar). Similarly, Dean L. Kinvin Wroth, who wrote on the Electoral Count Act four decades ago, said the day after the election that the Supreme Court majority “played ‘gotcha’” with the “safe harbor” deadline. William Glaberson, *The 43rd President: The Legal Issues; Concession on ‘Deadline’ Helped Seal Gore’s Defeat*, N.Y. TIMES, Dec. 14, 2000, at A24.

31. See 531 U.S. at 135 (Souter, J., dissenting); Fried, *supra* note 6.

32. U.S. CONST. art. II, § 1, cl. 4.

as practicable” after final ascertainment of the results of the election, to send a certificate of ascertainment of the electors chosen to the Archivist of the United States, and that “it shall also thereupon be the duty” of the executive, “on or before the day on which they are required . . . to meet,” to deliver six duplicate originals of that certificate to the electors.³³ The better interpretation, I believe, is that the executive’s duty to deliver certificates to the electors is made subject to the practicability standard; if it is impractical to certify the results beforehand, then the executive is not duty-bound to make the delivery.

In any event, if the executive fails, whether excusably or not, to make timely delivery, that does not mean that the state forfeits its electoral votes. Of course, timely certification makes much easier the job of Congress in counting the electoral vote; if there is a lawful certification and only one slate of electors votes, then usually there is no room for dispute.³⁴ This statute cannot reasonably be understood to require forfeiture of the state’s electoral votes if the executive was late in delivering a copy of the certificate to the electors, or even if the executive was late in certifying the results. At most, the statute *authorizes* the two Houses to reject votes if the votes were not regularly given by electors whose appointment was legally certified. It seems dubious that a late certification should be grounds for denying a state its votes. As explained below, if two slates of electors vote, and there has been no “safe harbor” determination, there is no doubt that Congress not only may, but should, count the votes (if regularly given) of a slate that the two Houses agree was the properly elected one, even if that slate has not been certified at all. It would be anomalous if the votes of a slate that was properly elected, but not certified, would count if another slate also voted on the designated day, but not if no other slate voted then. I conclude that if only one slate from a state votes on the designated day, and the votes are regularly given, Congress should decline to count their votes only if the two Houses determine not only that their appointment was not properly certified but also that they were not in fact elected. But two or more slates of electors can vote on the designated day, and it is then the job of Congress to determine which, if any, of the votes shall be counted. Indeed, 3 U.S.C. § 15 explicitly provides for Congress’s consideration of multiple slates and allows the possibility that Con-

33. 3 U.S.C. § 6 (1994).

34. *Id.* § 15 provides that:

no electoral vote or votes from any State which have been regularly given by electors whose appointment has been lawfully certified according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified.

gress will determine itself that a given slate was properly elected, even though that slate was not certified by the executive of the state—and even though another one was.³⁵ Thus, it is the responsibility of the two Houses to determine which slate was “appointed in accordance with the laws of the State,”³⁶ and so far as federal law is concerned that determination does not require certification at all. Indeed, if the two Houses agree, they can accept one slate even though another slate has been certified by the executive under seal, as prescribed by § 6.

On one occasion in the modern era, in Hawaii in 1960, two competing slates have indeed met and voted on the designated date.³⁷ The state of Hawaii first certified the Republican slate as the winners of the 1960 election but reversed itself after both slates voted and after the completion of a recount ordered by a state court over a protest that the completion would be too late for federal law.³⁸ This case is particularly interesting because the Democratic slate, the one that was accepted, received no certification before it voted.³⁹

35. That statute provides that if there is more than one purported return from a state, and there has been no “safe harbor” determination,

then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.

Id.

36. *Id.*

37. The only other occasion since passage of the Electoral Count Act on which two electoral slates submitted returns occurred in Oregon in 1888, the first election after passage of the Act. There was no serious dispute, however. 20 CONG. REC. 1, 1860 (1889). One slate was certified by the Governor and the other appears to have been a prank or the work of a crank. E-mail from Professor Stephen Siegel to discussion list for constitutional law professors (March 22, 2001) (on file with author). Many thanks to Professor Siegel for providing information on this and other double-return incidents.

Before passage of the 1887 Act, there were double-return incidents in Louisiana in 1872 and in 1876, and in Florida, South Carolina, and Oregon in 1876. In the 1872 Louisiana case, the entire election was marked by scandal and fraud, *see* W. DEAN BURNHAM, *PRESIDENTIAL BALLOTS: 1836-1892*, at 115-16 (1955), and Congress, being unable to decide which return—one certified by the secretary of State and another by the Governor—was valid, rejected both. L. Kinvin Wroth, *Election Contests and the Electoral Vote*, 65 DICK. L. REV. 321, 329-30 (1961); CONG. GLOBE, 42d Cong., 3d Sess. 1302-03 (1881). Four years later, with the state still in political chaos, it again sent double returns to Congress, and the Electoral Commission approved the Republican slate. In the 1876 Florida case, the Democratic electors received only an irregular certification before they voted and a certification from the new Governor afterward; in the South Carolina case, the Democrats apparently had little claim to victory and met and voted to keep up appearances. PAUL LELAND HAWORTH, *THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876*, at 155 (1906).

38. Wroth, *supra* note 37, at 341.

39. In the 1876 Florida case, the Electoral Commission concluded that it

Judge Posner is correct that the case lacks dispositive precedential value. Hawaii's votes did not affect the outcome of the national election. The President of the Senate, Richard Nixon, was the losing Republican candidate for President, doing his best to operate in gracious mode.⁴⁰ So that the count would not be delayed, and "without the intent of establishing a precedent," he suggested without objection that Congress accept the electors certified after the fact by the Governor "as the lawful electors from the State of Hawaii."⁴¹

Despite Nixon's obvious purpose simply to dispose of the matter quickly, the incident has considerable value for present purposes. There does not seem to have been any doubt at the time that Hawaii had valid electoral votes despite the fact that two slates voted on that date; the only question was *which* slate was valid. There is some sig-

is not competent under the Constitution and the law, as it existed at the date of the passage of [the Act creating the Commission, which charged the Commission with deciding according to then-existing law], to go into evidence *aliunde* the papers opened by the president of the Senate in the presence of the two houses to prove that other persons than those regularly certified to by the governor of the state of Florida, in and according to the determination and declaration of their appointment by the board of state canvassers of said state prior to the time required for the performance of their duties, had been appointed electors, or by counter-proof to show that they had not, and that all proceedings of the courts or acts of the legislature or of the executive of Florida subsequent to the casting of the votes of the electors on the prescribed day, are inadmissible for any such purpose.

ELECTORAL COUNT OF 1877, PROCEEDINGS OF THE ELECTORAL COMMISSION AND OF THE TWO HOUSES OF CONGRESS IN JOINT MEETING RELATIVE TO THE COUNT OF ELECTORAL VOTES CAST DECEMBER 6, 1876, FOR THE PRESIDENTIAL TERM COMMENCING MARCH 4, 1877 (1877), at 196, available at <http://moa.umd.umich.edu/cgi/sgml/moa-idx?notisid=ABF0865> [hereinafter PROCEEDINGS].

The Commission's vague reference to the Constitution has little weight; nothing in the Constitution addresses how the identity of the electors shall be ascertained, apart from the provision that they shall be appointed in the manner determined by the legislature. And, as indicated above, the statutory framework has changed; 3 U.S.C. § 15 clearly provides in some settings for Congress to make its own determination of which slate was elected.

Furthermore, in the Oregon case, the Commission did go behind the certificate of the Governor, though it did not have to recanvass returns. HAWORTH, *supra* note 37, at 166. The Republicans won the contest for the state's three electoral votes, but one of the candidates for elector was ineligible because he was a postmaster. The Governor, a Democrat, took the position that the votes cast for that elector were void, and he certified as the winning elector the fourth vote-getter, a Democrat. *Id.* at 165. The Republican electors took the view that their colleague had been validly elected but was ineligible to serve, so they filled the vacancy themselves and refused to cooperate with the Democratic elector, who appointed substitutes of his own. *Id.* at 157-67, 250-61; PROCEEDINGS, *supra*, at 640-41. The Oregon resolution is consistent with the result reached in the 1872 Louisiana case. A committee appointed by Congress to investigate those returns determined that "it would be proper for Congress to go behind the governor's certificate to determine whether a legal canvass had been made," but that "Congress itself could not canvass the votes without usurping the state's constitutional powers." Wroth, *supra* note 37, at 329-30.

40. Note his farewell remarks to Congress, after the completion of the count, lacking any suggestion that this was the Members' last chance to kick him around. 107 CONG. REC. 1, 291 (1961).

41. *Id.* at 290.

nificance in this light to the fact that Nixon spoke of “the” lawful electors; he was clearly operating under the assumption that there were some. In an analysis written shortly after the event, L. Kinvin Wroth, now Dean of the University of Vermont Law School, said that if Hawaii’s votes had been outcome-determinative, “Republican objections to the acceptance of the decree as binding would have been sound, whatever their fate in a Democratic Congress.”⁴² Wroth does not suggest that, if Hawaii’s votes had mattered, accepting the Democratic slate would have been an improper outcome, notwithstanding the fact that the slate was certified after it voted. He only contends, and properly, that in that setting the Governor’s certification of that slate should not have been accepted as binding: competing slates of electors had voted, and the state had made no “safe harbor” determination, so it would be up to Congress to determine which slate of electors was the valid one. Though the Governor’s certification would certainly play a role in that determination, it would not be binding on Congress. But no one seems to have doubted that one slate or the other should be counted or that the Democratic slate *could* validly be counted even though it was not certified before it voted.

I posed the question when Florida had to decide who—so far as it was concerned—had won the state’s electors. The real answer is that, though it would simplify matters if Florida decided early, the state was not absolutely compelled to decide at all. If the election contest was finally resolved by December 12 in satisfaction of the “safe harbor” provision of 3 U.S.C. § 5, then that resolution would be binding on Congress. If—as ultimately happened—there was no such final resolution of the contest⁴³ but the executive lawfully certified a slate, that slate voted as prescribed by law, and it was the only one to send a return of its vote to Washington, then, too there would be nothing for Congress to decide. But if there was no resolution of the contest satisfying the safe harbor and two or more slates voted on December 18, then it would be for Congress, in the vote count beginning on January 6, to decide, in accordance with the procedure set out in 3 U.S.C. § 15, which slate was properly elected. Congress would not be

42. Wroth, *supra* note 37, at 342.

43. In *Bush II*, issued on the evening of December 12, the Court reversed the judgment of the Florida Supreme Court and remanded the case “for further proceedings not inconsistent with this opinion.” *Bush v. Gore*, 531 U.S. 98, 111 (2000). The Florida Supreme Court ordered dismissal of the case on December 14 and issued an explanatory opinion on December 22. *Gore v. Harris*, 773 So. 2d 524 (Fla. 2000). Thus, the case was not finally disposed of on December 12. And, though as a political matter, the decision of that date was the *coup de grace* for Vice President Gore, it did not resolve all legal issues. It would have been possible for Gore to argue on remand that the United States Supreme Court had misunderstood Florida law and the Florida Supreme Court’s statements about that law, and that in fact that law allowed a recount to extend beyond December 12 if that was the only constitutional way to conduct one.

bound by any decision made by one state official or another. The two Houses could assess the validity of recounts recently completed or still in progress, and perhaps if they wanted to do so—not that it would necessarily be a good idea—they could even supervise their own recount.⁴⁴

Reading the Electoral Count Act, as I have argued it should be read, to allow counting of a slate that voted on the designated date even though it was not certified by that date squares with the history and purpose of the statute as well as its language, and yields an appealing result. Early certification is optimal, and the statute requires it when it can be done feasibly. But Congress enacted the statute with the recognition that sometimes the states would not be able to resolve the disputes in a timely manner, that multiple slates might vote on the designated date, and that sometimes resolution of the dispute might be left to Congress. The electors vote nearly three weeks before Congress begins to count the vote, and that is nearly two weeks before Inauguration Day. It would be an unfortunate result if a given slate voted on the designated date in mid-December, and by the time Congress began to count the vote, or shortly after, it became clear that this was the properly elected slate, and yet its votes could not count because state officials had not certified it before it voted. Such a result does not square with precedent, and the Electoral Count Act does not require it.

IV. THE FOURTEENTH AMENDMENT

Notably, some leading conservative jurists, including Judge Posner and Robert Bork, have disdained for the principal ground on which the United States Supreme Court held the manual recounts in Florida unconstitutional.⁴⁵ The critical issue in counting the Florida votes was that many punch-card ballots did not have holes punched through cleanly enough to be recorded by the counting machines as casting a vote for President but nevertheless had enough of a punch that arguably they provided an indication of the voter's intent. The Florida Supreme Court held that these "undervotes" should be re-

44. I believe this is an open question. See *supra* note 39 and accompanying text.

45. See Bork, *supra* note 6 ("[T]hese and similar disparities have always existed within states under our semi-chaotic election processes. By raising that to the level of a constitutional violation, the court federalized state election laws. The opportunities for uncertainty, litigation, and delay in close elections seem endless, which is probably why federal courts have never entered this particular briar patch before. Once the Equal Protection Clause is unleashed, it will apply to every federal, state, and local election in the country"); see also POSNER, *BREAKING THE DEADLOCK*, *supra* note 2, at 128. Charles Fried speaks more favorably about the Equal Protection holding, but nevertheless concludes that "the three concurring Justices, whose views Professor Dworkin does not discuss, were on sounder ground than the seven who found an equal protection violation." Fried, *supra* note 6.

counted manually, a vote to be counted if there was a clear indication of the intent of the voter.⁴⁶ But application of this standard differed from one canvasser to another, and even from one time to another, and the Florida Supreme Court did not elaborate on when the “intent of the voter” should be deemed established with sufficient clarity to treat a ballot as validly cast. Primarily for this reason, the United States Supreme Court held that the recounts as ordered by the Florida court violated the Fourteenth Amendment’s guarantee of equal protection of the law.⁴⁷ According to the majority, this general test

46. *Gore v. Harris*, 772 So. 2d 1243, 1253 (Fla. 2000), *rev’d sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000).

47. There were other grounds as well, but I believe they were less substantial. First, in selected counties, all the ballots were recounted but the recount ordered throughout the rest of the state by the Florida Supreme Court covered only the undervote. *Bush v. Gore*, 531 U.S. at 107. One concern is that different counties had different categories of votes recounted, but this appears to be insubstantial. The Florida law governing the protest phase provided that a manual recount will not be held at all in a given county except on request of a candidate, a political party, or (in the case of an issue on the ballot) a political committee. FLA. STAT. § 102.166(4) (2000), *amended by* 2001 Fla. Laws ch. 40, § 42, at 151-52. The law thus allowed for the possibility that recounts will be held in some counties. But no candidate, committee, party, or voter ever challenged this system. Another concern appears to be that certain categories of ballots were counted in a given county but not others. Thus, there may have been some voters whose ballots were improperly counted because they punched two holes but the machine only read one, and those ballots would not be recounted. *Bush v. Gore*, 531 U.S. at 107-08. Well, perhaps, but there could not have been very many of these ballots, and to discover them would require reviewing every punch-card ballot in the state; neither candidate was complaining about these, and neither was asking for a full recount. The Florida Supreme Court should have been entitled to restrict the recount to categories of ballots that appeared most likely to present problems. A similar response applies to the fact that the recount ordered by the Florida court would not address the “overvote”—cases in which the ballots had been deemed to indicate votes for two presidential candidates and so were treated as not casting a valid vote for any candidate. *Id.* The overvote problem is not symmetrical with the undervote problem, which appeared at the time to be the principal problem and was the one pressed by the Democrats. It is far more likely that a voter will (a) make a marking sufficient to yield a clear indication, on manual inspection, of intent to cast a vote but insufficient to be read by the machine, than that the voter will (b) cast a valid vote by punching out one hole but make a marking that (i) would be read by the machine as a second hole, therefore invalidating the vote, (ii) but on manual inspection would not affect the clear inference of intent to cast a single vote. Ironically, though, it now turns out that there was a far more significant overvote problem, one that may have turned the election for Vice President Gore if he had timely complained about it. A significant number of votes were apparently invalidated because they had a hole punched and a write-in indication—even though the hole was punched for the Democratic ticket and the name written in was Gore’s. But the Gore team apparently did not learn about this problem early enough to request a recount on the basis of it. POSNER, *BREAKING THE DEADLOCK*, *supra* note 2, at 80; Posner, *Florida 2000*, *supra* note 2, at 16 n.15.

Second, the Court interpreted the Florida decision as allowing a partial recount of a county to be included in the total if time to conduct the recount ended before the count could be complete. *Bush v. Gore*, 531 U.S. at 108. The Court’s interpretation of the Florida decision is far from an inevitable one. But in any event, this was clearly a premature concern. There was no way of knowing when the Supreme Court made its decision whether the Florida court would in fact be confronted with a partial recount of a county when the recount had to be halted.

was constitutionally inadequate given “the absence of specific standards to ensure its equal application.”⁴⁸ Judge Posner’s assessment of this holding, which he says he does “not find . . . compelling,” is worth quoting at some length, notwithstanding his own aversion to long block quotations:⁴⁹

The conduct of elections, including federal elections, has been confided to local government—to counties and indeed, to a considerable extent, to precincts. Different counties in the same state often use different equipment, methods, ballots, and instructions, generating different sources and rates of error. Ballots often are counted differently in different precincts, and, what is perhaps more important . . . , differently when they are counted at the county level rather than at the precinct level. Such differences had not previously been thought to deny equal protection of the laws. If they are now to do so, this portends an ambitious program of federal judicial intervention in the electoral process—a program the Supreme Court seems, given the haste with which it acted, to have undertaken without much forethought about the program’s scope and administrability.⁵⁰

This response, I believe, is right on the mark. Outside the context of this case, one would not have expected the Court to embark on such an ambitious program of supervising the technical aspects of electoral administration and counting. The majority decision is not a natural outgrowth of prior doctrine, and it does not appear that it will be a fruitful generator of future doctrine.

In addition, Judge Posner mounts an argument that—though ultimately it may not deny the possibility that any person had standing to complain about disparate standards, a matter with which the Court seems to have been very unconcerned⁵¹—puts the equal protec-

Finally, the Court expressed concern about the procedures under which the recounts would be held—the ad hoc nature of the counting teams, some of whom “had no previous training in handling and interpreting ballots,” and the inability of observers to object. *Id.* at 109. The Court did not explain why these concerns would amount to a constitutional violation, nor did it suggest constitutional standards of procedure such as prescribed training for counters or a requirement that in some circumstances observers be allowed to object. Certainly the Florida procedure was rough-and-ready, but if a recount was proper, those procedures would not make the recount contemplated by the Florida Supreme Court worse than none at all.

48. *Bush v. Gore*, 531 U.S. at 106.

49. See Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1424 (1995) (“[G]o easy on quotations, especially long block quotations.”).

50. POSNER, *BREAKING THE DEADLOCK*, *supra* note 2, at 128; see also Posner, *Florida 2000*, *supra* note 2, at 41.

51. The Court did not pause to ask whether any petitioner was a voter whose ballot was not counted but would have been counted under more generous standards applied in another county. Pamela Karlan has argued that there were no plaintiffs who both had standing and would have their claims remedied by the shutdown ordered by the Supreme Court. Pamela S. Karlan, *The Newest Equal Protection: Regressive Doctrine on a Changeable Court*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* (Cass R. Sunstein &

tion argument in an unappealing light. “If my dimple was not counted in the original election and yours was,” he asks, “what exactly is my complaint?”⁵² Neither ballot, in his view, should have been counted, and absent invidious discrimination (which was not shown), the counting of one ballot and not the other does not give the disfavored voter ground for complaint.⁵³ I am not as sure as he is that such a ballot should not have been counted,⁵⁴ but clearly three members of the majority thought it should not have been, because that proposition is one of the foundations of their concurrence based on Article II of the Constitution.⁵⁵ If one person receives a government benefit, another person who is similarly situated but does not receive that benefit may have a valid equal protection claim even though neither person had a *right* to the benefit. But if the law should have *precluded* the granting of the benefit, then the force of the claim is much diminished.

The *Bush II* majority relied on the Due Process Clause as well as on the Equal Protection Clause, though the *per curiam* opinion of the majority did not focus much on it or articulate the holding very well. Judge Posner has more sympathy for the due process holding than for the equal protection holding. According to him, the Florida Supreme Court’s refusal to adopt a specific standard for the recount, while accepting recounts from Broward and Palm Beach Counties that were based on methodologies inconsistent with each other, “can fairly be described as irrational,” even perhaps as the near equivalent of ballot-box stuffing.⁵⁶ But even here Judge Posner is hesitant, for “the creation of a federal duty to use uniform *precise* criteria in a recount” “would not be “an inconsequential doctrinal step.”⁵⁷

I find the variation in standards allowed by the Florida Supreme Court more tolerable than does Judge Posner, and *a fortiori* more than does the *Bush II* majority. Greater tolerance of variation should have been enough to reject both the equal protection and the due process arguments. Many standards that the law uses every day—for example, “beyond a reasonable doubt” and just about any test invoking a reasonable person—are subject to wide variation in application,

Richard A. Epstein eds., 2001); Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345, 1357-64 (2001).

52. POSNER, BREAKING THE DEADLOCK, *supra* note 2, at 129.

53. *Id.*; Posner, *Florida 2000*, *supra* note 2, at 41. He also asks, “Or if I was a good boy and punched my chad clean through, and you only dimpled your chad, what is my complaint if your dimple is counted as a vote . . . ?” *Id.*

54. *See infra* Part VI.

55. *See* Bush v. Gore, 531 U.S. 98, 118-20 (2000) (Rehnquist, C.J., concurring).

56. POSNER, BREAKING THE DEADLOCK, *supra* note 2, at 131; Posner, *Florida 2000*, *supra* note 2, at 42.

57. POSNER, BREAKING THE DEADLOCK, *supra* note 2, at 131; Posner, *Florida 2000*, *supra* note 2, at 42.

and yet the law is satisfied to apply such standards without further definition.

The *Bush II* majority recognized this point; indeed, it said: "The law does not refrain from searching for the intent of the actor in a multitude of circumstances; and in some cases the general command to ascertain intent is not susceptible to much further refinement."⁵⁸ But this case, in the Court's view, was different. The search for intent was limited to the evidence on the face of the ballot and so could be "confined by specific rules designed to ensure uniform treatment."⁵⁹ In other words, the problem was not so much that the intent standard was excessively vague as measured against some absolute measure of precision. Rather, the problem was that the standard was more subject to variation than it needed to be; Florida had forsaken an opportunity for precision.

Certainly uniform rules *could* be developed, but they would not necessarily be very good rules for determining a voter's intent. Even on the face of a single ballot, there is an infinite range, across several dimensions, of evidence bearing on the intent of the voter. How much of the chad is left attached, and where? If it is attached, how deeply indented is it? What patterns of punches and indentations are there elsewhere on the ballot? What markings, if any, are there?⁶⁰ Any simple rule by definition will exclude relevant information from the inquiry and so inevitably lead to inaccurate determinations. Any complex rule will inevitably lead to variations in application, even if one entity makes all the decisions; ask anybody who has to perform a recurring task of any complexity, such as calling balls and strikes throughout a baseball game,⁶¹ grading a set of law school essay exams, or trying to replicate a pasta sauce. The variations are inevitably greater if decisions are made separately by numerous decisionmakers.

All of which is not to say that trying to come up with more specific rules would have been imprudent. Perhaps it would have been a good idea. But the Florida statute, as understood by the Florida court, ar-

58. *Bush v. Gore*, 531 U.S. at 106.

59. *Id.*

60. Consider also write-in votes. What indication is sufficient for the write-in to be treated as designating a given ticket, thus allowing the ballot to be counted (and not to be invalidated if the voter also punched the hole for that ticket)? Only the full names of both candidates, as listed on the ballot? One surname? Sufficient information to indicate with reasonable certainty whom the voter intended? Ultimately any standard short of the intent of the voter may be inadequate to capture some ballots that were clearly intended to cast a vote for a given ticket. Thanks to Evan Caminker for this point.

61. See Tom Zeller, *The Strike Zone's Connected to the . . .*, N.Y. TIMES, Apr. 1, 2001, § 4, at 3 (describing major league baseball's attempts to discourage umpires from the "fashion" of "employing multiple strike zones of varying dimensions throughout the course of nine innings").

ticated only a general standard, and that was a constitutionally valid choice. It was a similarly valid, though clearly debatable, choice by the Florida Supreme Court not to embellish on the standard that it perceived in the statute, leaving the determination of how the standard would apply in individual cases to the persons charged with making those applications.

The Court's emphasis on the unused opportunity for precision helps explain one of the most curious aspects of the opinion. Clearly, the Court recognized one vulnerability of a holding based on lack of uniformity in standards for determining the validity of a vote. Differences between one county and another in determining what constituted a sufficient indication of the intent of the voter paled in comparison to the differences among counties in voting systems. Indeed, optical scanning systems appeared to be so much better than punch cards at ensuring that intended votes were recorded—at least when the ballots were scanned at the precinct immediately after being completed—that the manual recount of punch-card undervotes may be regarded as an attempt to minimize this disparity. But the Court could not demand true uniformity in election mechanisms across a state: that would not only be a judicial project of almost unimaginable scope, but it would render invalid the vote in many states. The question, the Court said,

is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court *with the power to assure uniformity* has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.⁶²

In other words, the Florida court could have done better to assure uniformity, given that it alone or the trial court under its supervision (rather than multiple decisionmakers) was in control of the statewide recount, and so it should be held accountable for not doing better. The reasoning has a Procrustean feel to it, as if it were drawn just to satisfy this case—an inference strengthened by the Court's emphasis that its "consideration [was] limited to the present circumstances."⁶³ Only "in the special instance of a statewide recount under the authority of a single state judicial officer" did the Court's demand for uniformity apply.⁶⁴ If, as had occurred during the initial protest phase, several counties held recounts under different supervisory of-

62. *Bush v. Gore*, 531 U.S. at 109 (emphasis added).

63. *Id.*

64. *Id.*

ficials and applied different standards, that would apparently not be a problem. For that matter, it appears that if state law authorized the Secretary of State to require a statewide recount, and she allowed her delegates to apply the intent standard in a differential manner, that would not be a problem, because she is not “a judicial officer.” But these distinctions seem to make little sense. The legislature, in establishing statewide rules, can delegate broad authority to local officials to refine, on a case-by-case basis, a broad statutory standard, and nothing in the *Bush II* opinion suggests that it cannot. Why, then, does the Fourteenth Amendment prevent a court with statewide supervisory power from doing the same thing, leaving it to local officials to implement a legislatively prescribed standard on a case-by-case basis? And, looked at from the other side: if the judicial refusal to articulate a more precise standard was unconstitutional because a single decisionmaker supervising the process could articulate such a standard, why is the legislative tolerance of vastly different voting systems acceptable, given that the legislature could if it wished mandate a uniform system statewide?

In short, though variations from county to county, or from ballot to ballot, as to what constituted a vote were unfortunate, and though perhaps the Florida Supreme Court should have acted more aggressively to limit them, they are to some extent inevitable and in any event should not be held unconstitutional. Perhaps *Bush II* will distort decisionmaking in the lower federal courts.⁶⁵ But I think it unlikely that the United States Supreme Court will ever use the case—really use it, not just include it in a string cite—to strike down another application of state election law as insufficiently uniform. The majority’s Fourteenth Amendment rationale was a disposable tool crafted for use on one occasion.⁶⁶

And yet, ironically, the tool did not even do the job for which it was made. The *Bush II* majority’s Fourteenth Amendment holding has one other notable defect, emphasized by Judge Posner. If the recounts ordered by the Florida Supreme Court failed to satisfy the Fourteenth Amendment, the remedy one would ordinarily expect would be a remand to give that court an opportunity to order constitutionally satisfactory recounts. But instead the Court shut the recounts down. As I have already indicated, and as Judge Posner

65. This is Judge Bork’s prediction. Bork, *supra* note 6, at 3.

66. So I’ve come up with another metaphor, which I think fits the case somewhat better than the two that are sufficiently inevitable to have to quote but sufficiently clichéd to put in a footnote. *Lambert v. Call*, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting) (expressing confidence “that the present decision will turn out to be an isolated deviation from the strong current of precedents—a derelict on the waters of the law”); *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting) (contending that the majority’s decision, by overruling a recent case, tends to bring decisions of the Court “into the same class as a restricted railroad ticket, good for this day and train only”).

agrees, the stated reason for this remedy—that satisfactory recounts could not be completed in compliance with the “safe harbor” provision of 3 U.S.C. § 5—is not persuasive. The Florida court should have been given the opportunity to determine whether later recounts should be held given that the Supreme Court decision made this the only way to hold a recount. Judge Posner suggests that the shutdown may still have been justified by the Fourteenth Amendment holding because it would not have been possible to complete a recount complying with the Supreme Court’s standards, and judicial review of it, by December 18, the date on which the electors voted.⁶⁷ Even if that factual premise is true—and I believe it is somewhat speculative—the Supreme Court certainly did not justify its decision on this basis. And in any event, as I have already shown in Part III, it was not in fact necessary that the proceedings be concluded by December 18. In sum, bridging the gap between a holding that the recounts ordered by the Florida court were defective and a decision effectively barring further recounts required something close to pure judicial fiat.

Could there have been a better way?

V. ARTICLE II: THE STRUCTURE OF THE ARGUMENT

Chief Justice Rehnquist, joined by Justices Scalia and Thomas, while helping to form a majority in support of the Fourteenth Amendment holding, would have barred the recounts on a different ground as well. In their view, the decision of the Florida Supreme Court requiring the recounts “impermissibly distorted” Florida’s election laws “beyond what a fair reading required,”⁶⁸ and thus violated Article II of the Constitution, which provides that each state shall appoint electors “in such manner as the Legislature thereof may direct.”⁶⁹ Judge Posner finds this ground of decision more attractive than the Fourteenth Amendment holding, as does Judge Bork.⁷⁰ Without confronting the question whether he actually believes the Article II argument was correct as a matter of law, Judge Posner believes it is sufficiently plausible to support what he regards as the Court’s act of judicial statesmanship in ending the contest.⁷¹

Before approaching the merits, it is apparent that an Article II holding would have two significant advantages over the Fourteenth Amendment holding. First, as Judge Posner points out, if Article II precludes a construction of state law authorizing manual recounts in the circumstances of the case, then the appropriate remedy is to bar

67. POSNER, *BREAKING THE DEADLOCK*, *supra* note 2, at 136-37.

68. *Bush v. Gore*, 531 U.S. at 115 (Rehnquist, C.J., concurring).

69. U.S. CONST. art. II, § 2.

70. Bork, *supra* note 6, at 3.

71. POSNER, *BREAKING THE DEADLOCK*, *supra* note 2, at 166.

the recount.⁷² There would be no reason to give the Florida Supreme Court an opportunity to conduct a permissible recount—for no recount would be permissible. Thus, the remedy that the United States Supreme Court actually adopted, shutting down the recount, would link up with the substantive basis of the decision, which it did not do with the Fourteenth Amendment holding.

Second, if an Article II holding was a misconstruction of law, it would at least be a narrowly focused one. If the Fourteenth Amendment holding were taken seriously, it would distort the law of the Fourteenth Amendment so far as it governs elections, and even more generally; thus, I have predicted that it will probably be ignored. By contrast, an Article II holding may never become relevant again, and if it does it would be in the context in which it arose—election of the President.

But is there merit to an argument that Article II precluded the recount? In this section, I examine the structure of such an argument. I conclude that Article II does impose constraints on how a state may select the manner in which it appoints its electors and even the manner in which it determines which electors have been appointed. In *Bush I*, the first case before the Supreme Court, the Court suggested that the state constitution cannot limit legislative choice on these matters.⁷³ That is true to some extent, I acknowledge, but it has no real bearing on this case. In his concurrence in *Bush II*, the Chief Justice drew a sharp distinction between judicial and legislative action. That, too, is significant in some settings, but I contend that this distinction as such is not significant here. It does correlate, however, with the one factor that I do believe is significant here, and which is also apparent in the Chief Justice's concurrence—whether the state action in question can plausibly be considered consistent with preexisting law.

In Part VI, I contend that, under this standard, the recount ordered by the Florida Supreme Court should have been upheld. And in Part VII, I contend that in any event the United States Supreme Court should not have reached the merits, instead leaving the matter to be decided by the political process prescribed by the Constitution and by federal statute.

A. *Legislature Versus State Constitution*

Article II prescribes that each state shall choose its electors in such manner as the legislature shall direct. “Not as the *state* shall direct,” as Judge Posner points out, “but as the state *legislature* shall

72. *Id.* at 156.

73. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76-77 (2000).

direct.”⁷⁴ In *McPherson v. Blacker*, the Supreme Court declared that Article II “leaves it to the legislature exclusively to define the method” of appointment.⁷⁵ The Court characterized the power as “plenary”⁷⁶ and quoted with apparent approval a Senate report stating, “This power is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States.”⁷⁷

In *Bush I*, the United States Supreme Court unanimously expressed concern on this score. The case addressed the Florida Supreme Court’s interpretation of Florida law to allow county canvassing boards a greater time to file their returns than the Secretary of State had permitted. The Justices remanded the case on the purported ground that they were “unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature’s authority under Art. II, § 1, cl. 2.”⁷⁸

On the other hand, dissenting in *Bush II*, Justice Stevens said that Article II “does not create state legislatures out of whole cloth, but rather takes them as they come—as creatures born of, and constrained by, their state constitutions.”⁷⁹ And he was able to point to a well-founded distinction in the way the Court has treated the Constitution’s mentions of state legislatures. Where the legislature is acting in a lawmaking capacity, it is subject to the usual constraints imposed by the state constitution on its making of law. Thus, the legislature’s power under Article I, Section 4 to prescribe the “time[, place[, and manner” of elections for Congress does not relieve it of the usual obligation of presenting its prescriptions to the governor for signature or veto⁸⁰ or of a state’s provision that acts of the legislature be subject to review by referendum.⁸¹ By contrast, when the legislature is asked to make a “binary decision,”⁸² as when it is asked to “act as a ratifying body” in considering constitutional amendments under Article V,⁸³ such constraints do not apply;⁸⁴ pointing thumbs up or

74. POSNER, BREAKING THE DEADLOCK, *supra* note 2, at 109; *see also* Posner, *Florida 2000*, *supra* note 2, at 29.

75. 146 U.S. 1, 27 (1892).

76. *Id.* at 25, 35.

77. *Id.* at 35 (quoting S. REP. NO. 43-395 (1874)).

78. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. at 78; *see also id.* at 77 (quoting *McPherson*, 146 U.S. at 25, that the language of Article II “operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power . . .”).

79. *Bush v. Gore*, 531 U.S. 98, 123 (2000) (Stevens, J., dissenting).

80. *Smiley v. Holm*, 285 U.S. 355, 367-68 (1932).

81. *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 566 (1916).

82. *Bush v. Gore*, 531 U.S. at 123 n.1 (Stevens, J., dissenting).

83. *Smiley*, 285 U.S. at 365.

84. *Hawke v. Smith*, 253 U.S. 221, 231 (1920) (holding that state referendum requirement does not apply to ratification under Article V). At least one legislative decision

thumbs down to a presumptive decision made elsewhere is not making law in the usual sense. And it seems quite clear, as Justice Stevens contended, that in determining the manner in which electors are to be appointed under Article II, the legislature is acting in a lawmaking capacity akin to that under Article I, Section 4.⁸⁵

Can the lines of cases on which Justice Stevens relies be reconciled with the principle asserted by *McPherson* and endorsed by *Bush I*? I believe that they can be. The distinction between substance and procedure—however creaky it may be in other contexts—serves well here, at least as a first cut and if we give the terms special meanings for this context: substance refers to the manner of selection prescribed by the legislature and procedure to the process by which the legislature makes the prescription. In fact, this distinction has guided state court decisions governing both Article I, Section 4 and Article II: The state constitution may make the ordinary procedures for the enactment of legislation applicable to the legislature's determination of the manner in which members of Congress are chosen or electors are appointed, but it may not restrict the manner of appointment that the legislature selects.⁸⁶ If it makes changes to the state's election laws, such as in the definition of the class of eligible voters, applicable to elections generally, those changes will presumptively be applicable to presidential elections. But that is only as a default matter. The legislature remains free to prescribe a different rule for selection of presidential electors.⁸⁷

Thus, for example, if the state constitution makes presentation to the governor for signature or veto a prerequisite for all legislation, that requirement may constitutionally be applied to the legislation determining the manner in which electors shall be appointed; in that

under the original Constitution—the election of Senators—could not be considered either lawmaking or binary; *Smiley* spoke of the legislature as “an electoral body” in performing this function. 285 U.S. at 365.

85. *Bush v. Gore*, 531 U.S. at 123 n.1 (Stevens, J., dissenting); see also James C. Kirby Jr., *Limitations on the Power of State Legislatures Over Presidential Elections*, 27 LAW & CONTEMP. PROBS. 495, 503 (1962).

86. Kirby, *supra* note 85, at 503-04 (drawing a distinction “between *how* and *what*” and showing that case law adheres to it).

87. Note the following language from the Senate report quoted by *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) (quoting S. REP. NO. 43-395 (1874)): “Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.” This passage acknowledges that a state constitution might make provisions, such as determining the qualifications of voters, that are substantive in the sense I have used that term—governing the manner of selection of electors rather than the process by which the legislature prescribes how electors are to be selected—and that presumptively would apply in presidential elections. If, as this passage indicates, such provisions are to be treated only as default rules, subject to defeasance for presidential elections by ordinary legislation, then they do not operate as constraints on the legislature.

respect, as Justice Stevens says, “Article II takes the legislature as it comes, created by and operating under the procedures established by the state constitution.”⁸⁸ Those procedures may include participation by the governor and even, at least arguably, by the people in a referendum. Article II does not, however, designate the state as a monolith to determine the manner of appointment. It designates the legislature. And the legislature, however broadly conceived it may be for these purposes, is an entity or group of entities capable of making law—in contrast to the state constitution, which is a body of law. Suppose, then, that the state constitution forbade felons to vote. If the legislature, operating under the authority granted it by Article II rather than by the state constitution, decided that this limitation should not apply in voting for presidential electors, the legislative choice should prevail.⁸⁹

However this general issue should eventually be resolved, it has little or nothing to do with decisions affecting the 2000 presidential election. The Florida Supreme Court did not interpret the election code to be in conflict with the state constitution and then hold that the latter invalidated the former. In *Gore v. Harris*,⁹⁰ the December 8 decision that was reviewed by *Bush II*—and the decision that really mattered, in which it ordered the statewide recount—the Florida court, taking the hint from *Bush I*, avoided reliance on constitutional sources altogether. Even in *Palm Beach County Canvassing Board v. Harris*,⁹¹ the November 21 decision reviewed by *Bush I*, in which it extended the deadline for counties to file their returns, the court did not perceive such a conflict. Rather, it interpreted the code in light of general principles found in the state constitution and elsewhere. It made perfect sense to do this. This is especially so given that, in the respects here relevant, the election code did not differentiate between presidential and other elections. One would expect the code to be

88. *Bush v. Gore*, 531 U.S. at 123.

89. Referendums pose an interesting problem. Suppose the legislature passed a statute allowing felons to vote and the people then rejected the statute in a referendum. Presumably *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565, 569 (1916), which upheld the validity of a referendum in the context of Article I, Section 4, would extend to this situation as well. The referendum could be considered part of the legislative process in the manner of a veto. But now suppose the referendum operated against an old statute, or on a blank slate—that is, state law previously said nothing about felons being ineligible to vote. Then it is harder to consider the referendum part of the process by which the legislature makes law; rather, it seems the referendum is a *different* lawmaking process, and its participants, the people of the state, are a lawmaker different from the legislature. Arguably, though, even in this situation, Article II’s reference to the legislature should include the referendum. The referendum is part of the ordinary, or at least generally authorized, lawmaking process, and perhaps it is that process rather than the particular body to which Article II refers.

90. 772 So. 2d 1243 (Fla. 2000), *rev’d sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000).

91. 772 So. 2d 1220 (Fla. 2000), *vacated sub nom.* *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

drafted, or in any event to be subject to being construed, in accordance with the state constitution. To hold that the legislation accords with the constitution is not to hold that the constitution constrained legislative choice. Thus, it could not have been particularly surprising when, asked on remand to explain the basis for its decision, the court was able to reach the same result without relying on constitutional sources.

B. Legislature Versus Judiciary

Chief Justice Rehnquist's concurrence in *Bush II* made much of the distinction between courts and the legislature,⁹² as does Judge Posner.⁹³ There is a considerable irony in the Chief Justice's emphasis on the distinction. Part of his professed concern for the need to protect legislative prerogatives was based on the perception that the legislature had sought the "safe harbor" offered by 3 U.S.C. § 5, which as noted above requires that the state's final resolution of a contest concerning the selection of its electors be made in accordance with previously established procedures.⁹⁴ But nothing on the face of the Florida election code refers to § 5; it is only references *by the Florida Supreme Court* that suggest as a matter of state law that the legislation should be understood, at least in ordinary circumstances, to seek protection of the "safe harbor."⁹⁵

That the Chief Justice's invocation of the legislative/judicial distinction may be suspect does not mean that the distinction lacks force under Article II. Once again, I believe Article II does draw such a distinction, but it is less important than might appear at first, in part because it correlates to a considerable extent with a distinction that is more consistently important and that is more relevant to *Bush II*—that between before-the-fact and after-the-fact lawmaking.

At least at the extreme, Article II must limit the role of state courts in a way that it does not limit the role of state legislatures. Suppose that some time before Election Day, the legislature deter-

92. *Bush v. Gore*, 531 U.S. at 115 (Rehnquist, C.J., concurring) ("This inquiry does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*.").

93. POSNER, *BREAKING THE DEADLOCK*, *supra* note 2, at 159-60 ("[T]he 'Manner directed' clause of Article II can be used to curb such abuses by confining the authority to make the rules for the appointment of the state's Presidential electors to the organ of government that operates prospectively, which is the legislature. Courts operate retrospectively."); *see also* Posner, *Florida 2000*, *supra* note 2, at 53.

94. *Bush v. Gore*, 531 U.S. at 113 ("If we are to respect the legislature's Article II powers . . . we must ensure that postelection state-court actions do not frustrate the legislative desire to attain the 'safe harbor' provided by § 5.").

95. *See supra* notes 23-25 and accompanying text. In any event, the state's desire to qualify for the safe harbor is a matter of state law. It should not add anything to an argument for federal intervention under Article II.

mined that the election as planned would be unfair and that the situation could not be remedied in time, that it enacted a statute providing that it should select the electors itself, in the old-fashioned way, and that on Election Day it did just that. Presumably this would be permissible; at least nothing in Article II precludes the legislature from doing so.⁹⁶ But now suppose instead the state supreme court held that the election as planned would be unfair, that state common law or constitutional law empowered the court to fashion an appropriate remedy, and that the appropriate remedy was that the court itself should choose the electors on Election Day. Even assuming the court has the power to enjoin the conduct of the election as planned—a plausible hypothesis, at least if that conduct would violate the Federal Constitution—it seems inadmissible to hold that Article II authorizes the court to select its own method of appointing the electors. The Constitution explicitly gave the power to determine the manner in which electors are chosen to the organ of government most subject to popular control. We cannot assume that mention of the legislature was haphazard, so that another part of state government can exercise the function.

On the other hand, courts obviously have a role in applying the law governing the selection of electors, because the legislature—including that of Florida—typically gives the courts such a role.⁹⁷ Indeed, Congress has assumed that the courts would likely be accorded such a role: the “safe harbor” provision⁹⁸ explicitly recognizes that a state may select a judicial tribunal as the ultimate decisionmaker within the state in resolving a contest concerning the selection of electors, and if that decision is timely the statute makes its determination binding upon Congress. It would be not only impractical but a substantial intrusion on state authority if every decision of the state supreme court concerning state election law in a presidential election were subject to *de novo* federal review. Clearly, as the Chief Justice acknowledged, the interpretations of the state supreme court are entitled to substantial deference.⁹⁹

Moreover, just as presentment to the executive is part of the lawmaking machinery of each state, interpretation by the judiciary may be considered to be as well. Suppose that on its face a provision of the state’s election code, applicable to elections in general, ap-

96. See *McPherson v. Blacker*, 146 U.S. 1, 34-35 (1892) (emphasizing that the legislature may resume the selection of electors at any time, and noting that the selection of electors by the Colorado legislature in the 1876 election was unchallenged, despite the heated controversy surrounding that election).

97. See FLA. STAT. § 102.168 (2000) (judicial proceeding to contest election), amended by 2001 Fla. Laws. ch. 40, § 44, at 153-54.

98. 3 U.S.C. § 5 (1994).

99. *Bush v. Gore*, 531 U.S. at 112 (Rehnquist, C.J., concurring).

peared clearly not to make the fact that an election was close sufficient grounds for ordering a manual recount—but that there was well-settled judicial precedent, developed over many years in cases involving nonpresidential elections, allowing recounts for that reason. Under any realistic understanding of what the law was as of the time of Election Day, it allowed such recounts. In a close contest for presidential electors, then, adherence to the law would seem to allow the recounts; Article II should not be deemed to require the state courts, or the United States Supreme Court, to disregard the established interpretation and rely only on the statutory text as if the intervening history had not occurred.

Now compare a hypothetical involving alteration of the law not before the election by the judiciary but after the election by the legislature. Suppose the election code and judicial interpretations of it were very clear that closeness of an election was not a sufficient ground to order a manual recount—and that shortly after a very close election the legislature changed the law to provide retroactively that manual recounts should be held whenever the election satisfied prescribed standards of closeness. Such an intervention, albeit legislative, is an attempt to alter the results of the procedure for selecting electors as established by the legislature before Election Day, and it should be constitutionally precluded.¹⁰⁰

Indeed, it appears—uncomfortable as it may have made counsel for Vice President Gore to assert it before the Supreme Court¹⁰¹—that after the election the courts have *more* legitimate room than does the legislature to refine the standards for determining whom the state selected as its electors on Election Day. The legislature can only make new law; it has no role in interpreting statutes already on the books.¹⁰² The judiciary, by contrast, is charged with interpreting and applying preexisting statutes. Sometimes, we know, the judiciary must confront a situation in which, perhaps because the law did not anticipate it, it is not clear what the governing principle of law is. And yet the judges must decide, and they should try to articulate reasons supporting their decision. For this reason, if for no other, judges must sometimes establish principles that were not clearly understood beforehand as stating the law. The performance of that role is legitimate, if for no other reason than that it is inevitable.

100. See *infra* Part V.C.

101. See Bork, *supra* note 6, at 3 (“Counsel for Gore was put in the untenable position at oral argument of contending that the Florida court could make postelection changes in the law that the legislature could not.”).

102. Note the famous remark of Rep. James A. Garfield to Rep. John A. Bingham: “My colleague can make but he cannot unmake history.” CONG. GLOBE, 42d Cong., 1st Sess., App. at 151 (1871).

In short, I am suggesting that the relative standing under Article II of state judicial and legislative decisionmaking that bears on the selection of the electors depends to a significant extent on timing. Before the election, judicial decisionmaking is less likely to be valid, because the legislature is the organ of state government designated by Article II to select the means by which electors are appointed.¹⁰³ After the election, judicial decisionmaking is if anything more likely to be valid. At that point, the problem is likely not to be determining the basic means of selection, but rather refining and applying the previously articulated principles for determining which electors were in fact the victors on Election Day. Thus, the concern with after-the-fact lawmaking takes preeminence. That, then, is the concern that is most relevant to the dispute in the 2000 election dispute, which arose once the polls were closed.

C. *Ex Ante Versus Ex Post*

The Florida decision reviewed in *Bush v. Gore* was issued after Election Day. Ex post, or after-the-fact, decisionmaking raises Article II concerns that ex ante, or before-the-fact, decisionmaking does not. If the decision is so significant that it could be deemed a change in the manner in which the state selects its electors, so that the state should be deemed not to have chosen its electors before the time of the decision, then the decision could violate the prescription of Article II that Congress may choose a date, as it has done, on which all states should choose electors.

More basically, a concern arises even if the decision is deemed only to affect the manner in which the state *determines* what choice it made on Election Day. Fundamental fairness precludes the state from making outcome-decisive changes in the rules for determining the winner of an election contest after the contest itself has been held. Such a principle has been found in the Due Process Clause of the Fourteenth Amendment.¹⁰⁴ But Article II, addressing the selection of electors, is a more focused forum for it, and that is the forum in which it has been discussed in the context of the 2000 election.¹⁰⁵ Article II clearly implies that the legislature must “direct” the man-

103. That does not mean that the judiciary has no valid role then. For example, a court may properly grant injunctive or declaratory relief resolving the meaning of an unclear statutory provision. But the judiciary would be limited to fair interpretations; unlike the legislature, it could not properly devise a new method of selection.

104. *Roe v. Alabama*, 43 F.3d 574, 580 (11th Cir. 1995).

105. I do not believe it much matters whether the issue is posed in terms of due process or Article II or both—except that the federal interest may be more apparent in the Article II context (this is the President being elected, not a sheriff), and the concern might appear more readily justiciable to the extent it is phrased in terms of due process. I suggest below, however, that even for the justiciability purpose the characterization should not matter. *See infra* note 182.

ner of appointment of electors before the state appoints the electors. A corollary is that, under the rules for determining the outcome as they stood on Election Day, if one candidate's slate of electors should be declared the winners, the rules should not be changed during the determination process in such a way that leads to declaration of another slate as the winners. This principle seems to underlie the requirement of 3 U.S.C. § 5 that, for a state's contest-resolution process to qualify for "safe harbor" status, it must be established before Election Day.¹⁰⁶

I have already suggested a hypothetical that highlights the importance of this principle. Suppose that, as of Election Day, state law was very clear that a manual recount could not be held simply because an election was close. Article II should prohibit the state from changing the law after a presidential election to provide that manual recounts could indeed be held in that election merely because the election was very close—and this prohibition should apply whether the change in law is effected by the legislature or by the courts.

The problem, of course, is that the law is not always so clear with respect to issues that arise in the counting of votes, and those issues must be resolved one way or another. Suppose that state law said nothing at all about manual recounts, and simply prescribed that all contests over the results of elections would be resolved by the judiciary. Then Article II should not inhibit the state courts from deciding one way or the other as to whether the recounts should be held.

Or suppose that there were decisions by the lower courts, or a pattern of administrative practice, limiting the circumstances in which manual recounts should be held, but the state supreme court had never ruled on the matter. Article II probably should not be construed to prevent the state supreme court from resolving the issue for the first time in the context of a contest over presidential electors, and doing it contrary to the prior sources of law. A supreme court is in place to be the ultimate expositor of the jurisdiction's law. It should not be bound by the decisions of inferior tribunals (though perhaps it owes them enough attention to determine whether they carry persuasive value) or precluded from resolving an issue for the first time in a contest in which that issue might matter more than ever before.

Finally, suppose that, in the eyes of a federal decisionmaker attempting to enforce Article II,¹⁰⁷ prior sources of law that *should* constrain the state supreme court—legislation and the court's own decisions—tend to point in a given direction but do so with some ambigui-

106. 3 U.S.C. § 5 (1994).

107. For now, I am not addressing the question whether that decisionmaker should be in Congress or on the Supreme Court.

ity. Here again Article II should probably not be read to compel the state supreme court's choice. Legal doctrine, we all know, is often open-textured and debatable. Article II should not become a tool to federalize state law concerning disputes in determining the results of the state's election for presidential electors by depriving state courts of the usual leeway to decide difficult cases.

Thus, while Article II should be understood to pose some restraints on the results that a state court can reach in resolving such disputes, the restraints must not be tight. Unless the principles applied by the court amount to a clearly implausible construction of state law as the law stood on Election Day, there should not be an Article II problem.

Interestingly, this standard is not far from the one prescribed by the Chief Justice in his concurrence; he asked whether "the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II."¹⁰⁸ That opinion reflected a concern with the respective roles of the judiciary and the legislature as well as with after-the-fact decisionmaking.¹⁰⁹ I have argued in this Part that the former concern as such should not have been a significant factor in *Bush v. Gore*. But I have also argued that the latter is a legitimate one to raise under Article II when a state court resolves a dispute over the results of a presidential election. In Part VI, I turn to the question of whether the concern was serious enough in the Florida case to warrant federal intervention. And Part VII addresses the question of whether the Court should have determined the merits of the Article II issue.

VI. THE FLORIDA SUPREME COURT'S DECISIONS UNDER THE ARTICLE II LENS

Florida election law provides for two basic postelection procedures by which a candidate may challenge the results of an election. First is an administrative procedure called a protest, in which a candidate may challenge a county canvassing board's initial count of the votes. When a preliminary recount of selected precincts "indicates an error in the vote tabulation which could affect the outcome of the election," the board may conduct a manual recount of all ballots in the county.¹¹⁰ At least ordinarily, the protest is supposed to be resolved, and the votes certified by the board, within seven days of the elec-

108. *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring).

109. *See id.* at 114 ("In order to determine whether a state court has infringed upon the legislature's authority, we necessarily must examine the law of the State as it existed prior to the action of the court.").

110. FLA. STAT. § 102.166(5) (2000), *amended by* 2001 Fla. Laws ch. 40, § 42, at 151-52.

tion.¹¹¹ Second is a contest, which begins only after a winner is certified. The contest is a judicial procedure in which a candidate can establish his right to an office on any of several grounds, among which is “[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.”¹¹² The court has broad power “to provide any relief appropriate under such circumstances.”¹¹³

Secretary of State Katherine Harris refused to extend the seven-day deadline for certification by the county boards to give the boards additional time to conduct manual recounts,¹¹⁴ and she indicated that voter error, including failure to punch a punch-card ballot properly, did not justify holding a manual recount.¹¹⁵ Nevertheless, on November 21, the state supreme court ordered her to accept returns through November 26, thus allowing more time for manual recounts in counties where Vice President Gore had requested them.¹¹⁶ And on December 8, the court ordered judicially supervised hand recounts throughout the state of the “undervote”—ballots that contained no marking registered by the counting machines in the vote for President.¹¹⁷ The first decision was reviewed and vacated in *Bush I*, and the second was reversed in *Bush II*.

In the Chief Justice’s view, the Florida Supreme Court committed four basic and interrelated errors that together condemn its decisions under Article II: (1) manual recounts were not justified by the statute, because there was not an error in the vote tabulation or a failure to count legal votes—difficulties with attached chads on punch-card ballots were attributable to voter error;¹¹⁸ (2) the extension of the time for certification disregarded the governing statute;¹¹⁹ (3) the decision in the contest made the initial certification meaningless;¹²⁰ and (4) the recounts jeopardized the state’s ability to take advantage of the “safe harbor” offered by 3 U.S.C. § 5.¹²¹ Judge Posner agrees with

111. *Id.* § 102.111(1), amended by 2001 Fla. Laws ch. 40, § 39, at 146; *id.* § 102.112(1), amended by 2001 Fla. Laws ch. 40, § 40, at 146-47.

112. *Id.* § 102.168(3)(c).

113. *Id.* § 102.168(8), repealed by 2001 Fla. Laws ch. 40, § 44, at 154.

114. 00-10 Fla. Op. Div. of Elec., Letter from L. Clayton Roberts, Director, Div. of Elec. to Hon. Charles Burton, Chairperson, Palm Beach County Canvassing Bd. (Nov. 13, 2000), available at http://election.dos.state.fl.us/opinions/de2000/de00_10.html.

115. 00-13 Fla. Op. Div. of Elec., Letter from L. Clayton Roberts, Director, Div. of Elec. to Hon. Charles Burton, Chairperson, Palm Beach County Canvassing Bd. (Nov. 13, 2000), available at http://election.dos.state.fl.us/opinions/de2000/de00_13.html.

116. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1240 (Fla. 2000), vacated *sub nom.* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000).

117. Gore v. Harris, 772 So. 2d 1243, 1262 (Fla. 2000), *rev’d sub nom.* Bush v. Gore, 531 U.S. 98 (2000).

118. Bush v. Gore, 531 U.S. at 119 (Rehnquist, C.J., concurring).

119. *Id.* at 121-22.

120. *Id.* at 118.

121. *Id.* at 120-21.

each of these objections, except perhaps the last. With respect to each but the last, the alleged errors are arguably compounded by the failure of the state supreme court to defer to the discretion of other officials—the Secretary of State, the canvassing boards, and the trial court. I will address each of these objections in turn.

A. *The Standard for Valid Votes and for Recounts*

1. *The Substantive Standard*

A key premise of the Article II analysis both of the Chief Justice and of Judge Posner is the proposition that a punch-card ballot without a hole for a single presidential candidate punched cleanly through, knocking the chad off, does not properly cast a vote for President.¹²² Judge Posner contends that voters were instructed to punch the chad cleanly through; a voter who failed to do so, therefore, failed to comply with instructions.¹²³

From this premise, the Chief Justice and Judge Posner draw the conclusion that hand recounts should not have been held. As I have just indicated, the Florida statute governing the protest phase provides for hand recounts only if there is “an error in the vote tabulation which could affect the outcome of the election;”¹²⁴ though the language is less clear than it might be, it would appear that such an error is the counting of illegal votes or the failure to count legal votes. This is indeed the standard explicitly adopted by the contest statute, which authorizes relief for “[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or

122. *Id.* at 119; POSNER, *BREAKING THE DEADLOCK*, *supra* note 2, at 62 (error in tabulation occurs when “the ballot contains a cleanly, completely punched-through vote for Gore and for no other Presidential candidate, yet the counting machine somehow failed to record it as a vote for Gore”); *see also* Posner, *Florida 2000*, *supra* note 2, at 9.

123. In his *Supreme Court Review* article, Judge Posner says:

In the counties that used punchcard machines, not only was the voter instructed to punch a clean hole through the ballot (no dimples); he was also told to turn the ballot over after removing it from the voting machine and to make sure there were no bits of paper stuck to it, that is, no dangling chads.

Posner, *Florida 2000*, *supra* note 2, at 7-8. But this is not fully accurate, because as pointed out below such an instruction was not given in all punch-card counties. In his book, Judge Posner has taken into account the county-to-county variation:

In the counties that used punchcard machines, the voter was instructed to punch a clean hole through the ballot (in Broward County, for example, the instruction was to ‘punch the stylus straight down through the ballot card for the candidates or issues of your choice’). And in the two most populous of those counties, he was also told to turn the ballot over after removing it from the voting machine and make sure there were no bits of paper stuck to it, that is, no dangling chads.

POSNER, *BREAKING THE DEADLOCK*, *supra* note 2, at 59. The Broward instruction, however, says nothing explicit about a clean hole, and, as indicated below, I do not believe it needs to be read as calling for one.

124. FLA. STAT. § 102.166(5) (2000), *amended by* 2001 Fla. Laws ch. 40, § 42, at 151-52.

place in doubt the result of the election.”¹²⁵ But failure to make a clean hole, in the Rehnquist-Posner view, is an error by the voter; a ballot made in violation of instructions and lacking a clean hole is in their view not a legal vote and failure to count it is not an error in the vote tabulation.¹²⁶ A corollary is that the Florida Supreme Court erred in its protest-phase decision of November 21,¹²⁷ when it required an extension of the time for county canvassing boards to conduct hand recounts,¹²⁸ and in its contest-phase decision of December 8,¹²⁹ when it ordered judicially supervised hand recounts throughout the state of the “undervote,” ballots that contained no marking registered by the counting machines as a vote for President.¹³⁰

There is some appeal to the clean-hole standard, which puts responsibility on the voter to get it right. But I do not believe it is the standard provided by Florida law for what constitutes a legal vote.

125. *Id.* § 102.168(3)(c).

126. *Bush v. Gore*, 531 U.S. at 118-19 (Rehnquist, C.J., concurring) (“[T]he [Florida] court’s interpretation of ‘legal vote,’ and hence its decision to order a contest-period recount, plainly departed from the legislative scheme. Florida statutory law cannot reasonably be thought to *require* the counting of improperly marked ballots.”). Judge Posner says:

[T]here were few if any errors in the machine tabulation of the Florida Presidential votes, at least after the machine recount. . . .

. . . The dimpled and dangling chads discovered in the hand recounts were the result of voters’ either failing to follow the instructions or, if the voting machine itself was defective, failing to seek the assistance of one of the precinct election workers.

. . . [U]nder the Florida election code only errors in the *tabulation* of the vote authorize the canvassing board to order a complete hand recount of the county’s votes. . . .

. . . Distinguishing between errors in voting and in tabulation is important because the voter is complicit in the former error whereas the latter error is invisible to the voter. If the punchcard machine does not work and as a result the voter does not emerge with a fully punched-through ballot, he should know, if he has read the directions, that he has a spoiled ballot, and he should request a fresh ballot and a properly operating voting machine.

POSNER, *BREAKING THE DEADLOCK*, *supra* note 2, at 86, 95, 98-99; *see also* Posner, *Florida 2000*, *supra* note 2, at 18, 25-26 (virtually identical).

127. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000), *vacated sub nom. Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

128. POSNER, *BREAKING THE DEADLOCK*, *supra* note 2, at 95.

If voter error, not being an error in tabulation, is not a valid ground for a complete hand recount, there was no possible justification for extending the statutory deadline for the submission of a county’s votes in order to permit an effort to recover votes from ballots rejected because of voter error. The only reason the county canvassing boards needed extra time was to complete the laborious hand recounts necessary to infer the voter’s intention from the markings on a ballot that the voter had spoiled. . . .

Id.; Posner, *Florida 2000*, *supra* note 2, at 25.

129. *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000), *rev’d sub nom. Bush v. Gore*, 531 U.S. 98 (2000).

130. POSNER, *BREAKING THE DEADLOCK*, *supra* note 2, at 118 (saying that the decision of December 8 was “a surprise,” in part because “it had become clear at the trial [of the contest action] that no consensus had emerged on an objective standard for recovering votes from a hand count of spoiled ballots”); Posner, *Florida 2000*, *supra* note 2, at 33-34.

At the outset, it is important to note that the clean-hole instruction was not given in every punch-card county. Chief Justice Rehnquist's concurring opinion in *Bush* made it sound as if this was a statewide instruction,¹³¹ but that was misleading. His source, Judge Tjoflat's opinion in the United States Court of Appeals for the Eleventh Circuit dissenting from denial of preliminary relief, made clear that the instructions later quoted by the Chief Justice were given only in Palm Beach County; the Broward County instructions, also quoted by Judge Tjoflat, said nothing about knocking the chad off or checking the back of the card.¹³² The instructions given on the website of the Broward County Supervisor of Elections now tell voters to knock the chads off the ballot.¹³³ But the instructions on the website as it stood on Election Day did not say this, and neither did the instruction card given to voters in the polling place. They did say that the voter should "punch the stylus straight down through the ballot card,"¹³⁴ but a voter can do that and yet leave an attached chad. Some of the counties using the Votomatic machines had instructions similar to those used in Palm Beach.¹³⁵ Others, though, had instructions similar to those in Broward, without any mention of the need to clean chads off.¹³⁶ The clean-hole standard, therefore, cannot be a statewide standard for determination of what constitutes a legal vote.

Perhaps one could attempt to resuscitate the Rehnquist-Posner view by stating that a valid vote is one cast in accordance with instructions given to the voter. It would be rather ironical for the Chief Justice to adopt this standard, because it would plainly require county-to-county variation in determination of what constitutes a valid vote. Beyond that, it would be overly restrictive and impossible to enforce if taken seriously. Officials could not, and should not, invalidate the ballot of a Palm Beach voter for failing to check the back of the card for dangling chads, or the ballot of a Broward voter who pushed her stylus through the card at an angle rather than straight

131. *Bush v. Gore*, 531 U.S. at 118 (Rehnquist, C.J., concurring).

132. *Touchston v. McDermott*, 234 F.3d 1133, 1141 n.19 (11th Cir. 2000) (Tjoflat, J., dissenting):

Instructions to voters in Palm Beach County, a county that uses punch card technology, read: "After voting, check your ballot card to be sure your voting sections are clearly and cleanly punched and there are no chips left hanging on the back of the card." The instructions in Broward County, also a punch card county, read: "To vote, hold the stylus vertically. Punch the stylus straight down through the ballot card for the candidates or issues of your choice."

133. Broward County Supervisor of Elections website, available at <http://www.browardsoe.org/voting/votoinst.htm>.

134. *Touchston*, 234 F.3d at 1141 n.19.

135. These included Collier, Hillsborough, Miami-Dade, Osceola, Pasco, Pinellas, and Sarasota Counties. Copies of instruction cards are on file with the author.

136. These included Duval, Lee, and Marion Counties. Copies of instruction cards and materials are on file with the author.

down.¹³⁷ The fact is that many votes are counted without dispute even though the voter fails to comply with the instruction to punch a hole cleanly through; indeed, state law, in mandating a machine recount in close elections, anticipates that a second machine run of the ballots will count ballots that were missed on the first run because of attached chads. If these votes were not valid, then it would be “an error in the vote tabulation” to count them.¹³⁸ One consequence would be that the canvassers would have to have a hand recount if for no other reason than to pick out and discard all ballots with attached chads—a silly result given that the machine had counted them and all or virtually all of them clearly reflected the voter’s intent.

One adhering to the Rehnquist-Posner view could try to navigate around this problem by contending that an invalid vote is one that, *because* it was cast in violation of the instructions given to the voter, was not tabulated by the machines. Like a simple clean-hole test, this more complex standard may be perfectly sound and sensible. It says to the voter in effect: “You really should follow instructions, and if you don’t you take a risk. You may get lucky, because the machine sometimes counts imperfect ballots.¹³⁹ But if it doesn’t count yours because you didn’t do a good job, you have nobody to blame but yourself.” Sensible as this standard may be, however, it would be hard to read it into current Florida law.

Certainly nothing in the election code suggests that the instructions given to voters in a particular county provide the standard for what constitutes a legal vote in that county, and so for what constitutes an error in the vote tabulation. Those instructions, established

137. See *supra* note 132.

138. An alternative would be to say that if the voter fails to knock the chads off then whichever result the machine yields—counting the vote or not—should not be considered an error in tabulation. “Does the machine count it?” would be a plausible standard of law as to what is deemed a valid vote, though it is different from the instruction-based standard used by Judge Posner. It is clearly not the standard created by Florida law, however, and it would seem most unattractive to hold that, though the law contains a standard of validity incorporating considerations other than the machine response, whether the machine happens to read the ballot or not is controlling in determining whether the vote shall actually count.

Another alternative, at least superficially simpler, would be to prescribe that, whatever the state of the chads, a vote is valid if the machine counts it and not if it doesn’t. Such a rule would be tolerable, however, only if it included an exception providing that a vote would not be invalidated by failure of the machine to count it if the machine was broken. This proviso might mean that the alternative would still contain a good deal of ambiguity, because a party could contend that failure of the machine to mark ballots marked in a certain way demonstrates that it is broken. Nevertheless, this alternative might be a useful one, if punch-card ballots are to be used. But this standard was not the one created by Florida law.

139. Judge Posner acknowledges, “Some dangling-chad ballots are, *as it were by happy accident*, tabulated as votes, simply because the chad though not fully dislodged lets enough light through the chad hole to enable the tabulating machine to register a vote.” POSNER, *BREAKING THE DEADLOCK*, *supra* note 2, at 96 n.16 (emphasis added).

pursuant to legal authority but not by law, should be regarded merely as what they are on their face—as instructions, telling the voter what to do to minimize difficulty and the chance of error in counting the vote. For the true standard under Florida law of a legal vote we must search not the Palm Beach County instructions but the election code itself.

The Florida Supreme Court construed the statute reasonably by deriving from it the standard of whether there is “a clear indication of the intent of the voter.”¹⁴⁰ True, the statute is less transparent than one might wish in this respect, but this standard does emerge with sufficient clarity.¹⁴¹ The statute adopts this standard explicitly in providing how “damaged or defective” ballots should be counted.¹⁴² This provision at least arguably does not apply to a ballot merely because the ballot bears an attached chad rather than a clean hole¹⁴³—though if such a ballot be characterized as a “spoiled ballot,” as Judge Posner does persistently and rather surprisingly (is a ballot really “spoiled” because it has an insufficient marking?), the case for applicability may be rather strong. In any event, the adoption of the “clear indication of the intent of the voter” standard with respect to damaged or defective ballots is at least suggestive of an underlying concept of validity. The succeeding subsection of the statute strengthens this indication, providing, “If an elector marks more names than there are persons to be elected to an office or *if it is impossible to determine the elector’s choice*, the elector’s ballot shall not be counted for that office, but the ballot shall not be invalidated as to those names which are properly marked.”¹⁴⁴ The statute also makes the intent of the voter determinative (without saying explicitly how clearly the intent must be indicated) in providing how a manual recount should be conducted, once the decision to conduct it has been

140. *Gore v. Harris*, 772 So. 2d 1243, 1257 (Fla. 2000), *rev’d sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000).

141. One can imagine bizarre hypotheticals that press the point. Suppose that in a punch-card county a voter drops in the ballot box not the prescribed ballot form but a videocassette recording the voter signing of her preference for Gore. No matter how clearly the voter indicated her intent to vote for Gore, the state would presumably be justified in not counting the vote, because the voter intentionally did not use the method of voting prescribed by the responsible election officials. I believe this case is far different from one in which the voter used the prescribed method but, perhaps through inadvertence or failure of understanding, failed to do so properly. *Cf.* *Florida ex rel. Nuccio v. Williams*, 120 So. 310, 315 (1929) (articulating “substantial compliance” test; vote not to be counted “[w]here there is no semblance of an attempt on the part of a voter . . . to express a choice by making a [proper] mark,” but election officers may determine that an imperfect mark was intended to comply and so count the vote).

142. FLA. STAT. § 101.5614(5) (2000) (“No vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board.”).

143. *Gore v. Harris*, 772 So. 2d at 1266 (Wells, C.J., dissenting).

144. FLA. STAT. § 101.5614(6) (2000) (emphasis added).

made.¹⁴⁵ This provision sets a bottom-line standard for what constitutes a vote. It makes little sense to provide that the intent standard applies in conducting a hand recount but some other standard as to what constitutes a vote applies in determining whether the machines have erred in tabulating the vote.

In other words, the “error in the vote tabulation” standard should be applied by looking ahead to the intent standard. At least this is a plausible, not outlandish reading of the statute. But we should not stop with the face of the statute. To determine the state of Florida law as of Election Day, we should examine prior Florida practice and case law. For all their concern about postelection changes in law, neither the Chief Justice nor Judge Posner do this. Such an examination shows quite clearly that the prior understanding of election officials was in accordance with the intent standard articulated by the state supreme court. Failure to follow instructions (even statutory instructions) or to punch a clean hole in a punch-card ballot did not usually invalidate a vote;¹⁴⁶ even if the machine failed to read the ballot, bal-

145. *Id.* § 102.166(7)(b), amended by 2001 Fla. Laws ch. 40, § 42, at 152. (“If a counting team is unable to determine a voter’s intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter’s intent.”).

146. In *Florida ex rel. Carpenter v. Barber*, 198 So. 49, 50-51 (Fla. 1940), the state supreme court said:

The statute . . . suggests that the cross mark “X” shall by the elector be placed before the name of the candidate of his choice. [Two of the ballots in question] fail to meet the requirements of the statute in that the cross mark “X” as made by the elector was placed after the name of the candidate of his choice [rather] than before. It cannot be said that the statute . . . is mandatory and on the failure of the voter to conform thereto that his said ballot should not be counted, and especially is this true when the cross mark “X” appears on the right of the name of the candidate and thereby clearly indicates his choice and declares the intention of the voter. The intention of the voter should be ascertained from a study of the ballot and the vote counted, if the will and intention of the voter can be determined, even though the cross mark “X” appears before or after the name of said candidate.

Generally, the courts in construing statutes relating to elections, hold that the same should receive a liberal construction in favor of the citizen whose right to vote they tend to restrict and in so doing to prevent disfranchisement of legal voters and the intention of the voters should prevail when counting ballots, and the placing of a cross mark “X” to the right of a name appearing on the ballot when the statute says that the same shall be placed before the name is not mandatory but at the most is formal or directory. It is the intention of the law to obtain an honest expression of the will or desire of the voter.

Citations omitted. *Accord Florida ex rel. Nuccio*, 120 So. at 315; *Darby v. Florida ex rel. McCollough*, 75 So. 411, 421 (Fla. 1917) (stating that the lower court acted properly in requiring election officials to count two decisive ballots that were marked after the object of the voter’s choice, rather than before as directed by statute, but “so marked as to plainly indicate the voter’s choice and intent . . .”); *see also Boardman v. Esteva*, 323 So. 2d 259, 262-65 (Fla. 1975):

At issue is whether the absentee voting law requires absolute strict compliance with all its provisions, or whether substantial compliance is sufficient to give validity to the ballot.

. . . .

lots with attached chads were tallied in hand recounts, so long as the intent of the voter was indicated with sufficient clarity;¹⁴⁷ and hand recounts were held in close elections even in the absence of suspicion of fraud because election officials recognized that the machines are not fully accurate in counting ballots that are imperfectly marked but still valid.¹⁴⁸

2. Administrative Discretion

Even if I am right, that the intent of the voter provides the governing standard under Florida law for determining whether a vote has been validly cast, and whether a manual recount should be held, that does not end the matter. During the protest phase, the Secretary of State issued a series of opinions taking the position that an “error in the vote tabulation” means “a counting error in which the vote tabulation system fails to count . . . properly punched punch card ballots,”¹⁴⁹ and that “[v]oter error” does not qualify, so that failure of the machines to count ballots of voters who had “fail[ed] to properly follow voting procedures” would not justify a manual recount.¹⁵⁰ These

In developing a rule regarding how far irregularities in absentee ballots will affect the result of the election, *a fundamental inquiry should be whether or not the irregularity complained of has prevented a full, fair and free expression of the public will*. Unless the absentee voting laws which have been violated in the casting of the vote expressly declare that the particular act is essential to the validity of the ballot, or that its omission will cause the ballot not to be counted, the statute should be treated as directory, not mandatory, *provided such irregularity is not calculated to affect the integrity of the ballot or election*.

But see McAlpin v. Florida *ex rel.* Avriett, 19 So. 2d 420 (Fla. 1944) (finding that use of cross mark is mandatory).

147. Alicia Caldwell, *3 Counts; Fischer is Still Winner*, ST. PETERSBURG TIMES, July 17, 1993, at B1 (“Generally, everyone [in four City Council races] gained a handful of votes because of closer scrutiny of ballots by hand recount. Ballots partly punched, for instance, would not have registered on machines. But they were counted in the hand count, if the voter’s intent seemed clear.”); Laura Lafay, *Recount Confirms Winning Votes for Jim Swan*, OSCEOLA SENTINEL, Sept. 12, 1990 (“Swan picked up one additional vote during the recount because one of the holes in a ballot was not punched sufficiently,” according to supervisor of elections); *cf.* Jim Runnels, *Cowin is Defeated by 12 Votes*, ORLANDO SENTINEL TRIB., Sept. 6, 1990 (after hand recount, election official says, “We did our best to try and determine what the voter intended.”).

148. Lance Oliver, *Stone Holds 7-Vote Lead But Faces 1 More Recount*, ORLANDO SENTINEL TRIB., Sept. 6, 1990, at D1 (a ballot marked at the edge of the box was not counted by machine, but “[t]he hand recount caught the error”); Patricia Walsh, *After Vote Recount, Judge Again Comes Out Ahead*, SARASOTA HERALD-TRIB., Nov. 8, 1996 (election official saying before recount in close election that “the computerized ballot counting system isn’t foolproof” and that “most problems result from human error on the part of voters”). Note also the recount cases described *supra* note 147.

149. 00-11 Fla. Op. Div. of Elec., Letter from L. Clayton Roberts, Director, Div. of Elec. to Al Cardenas, Chairman, Republican Party of Fla. (Nov. 13, 2000), *available at* http://election.dos.state.fl.us/opinions/de2000/de00_11.html.

150. 00-12 Fla. Op. Div. of Elec., Letter from L. Clayton Roberts, Director of Div. of Elec. to Hon. Jane Carroll, Broward County Supervisor of Elec. (Nov. 13, 2000), *available at* http://election.dos.state.fl.us/opinions/de2000/de00_12.html.

opinions did not attempt to determine precise rules as to what constituted a “properly punched punch card ballot,” but they did look to the voter instructions for the determination of what constitutes a valid vote. Thus, the Chief Justice said that the Florida Supreme Court “must defer to the Secretary’s interpretations.”¹⁵¹ Similarly, Judge Posner says that “her interpretation, if reasonable, is conclusive.”¹⁵²

Even if, as a matter of Florida administrative law, the state supreme court should have followed the Secretary’s interpretation—a matter that I will question—it requires a rather unappealing jump to make an Article II violation out of this point. The argument is that the manner of selecting electors prescribed by the legislature before Election Day accorded interpretive discretion to the Secretary, and that by illegitimately overriding her exercise of discretion the court was making an *ex post* change in the manner of selection. But bear in mind that the Secretary’s interpretation was itself issued after Election Day, far outside any protective veil of ignorance. Furthermore, as I have just shown in Part VI.A.1, an interpretation treating compliance with instructions to voters as the measure of a valid vote, however sensible it may be in the abstract, is not well grounded in the statute. The “clear intent of the indication of the voter” standard, by contrast, is drawn from the language of the statute and is clearly in accord with prior case law and practice. If the question were which substantive standard—the one adopted by the Secretary or the one adopted by the state supreme court—better accorded with the law and practice established by the legislature before Election Day, the latter would be the better choice. Indeed, it would have been an interesting question whether the Secretary’s interpretation constituted such a dramatic departure from the prior law as to be an Article II violation.¹⁵³

Nevertheless, let us consider the question of the state supreme court’s obligation of deference under Florida administrative law. That court said that the state’s courts “will not defer to an agency’s opinion that is contrary to [state] law.”¹⁵⁴ The truth is murkier and more complicated than either this statement or Chief Justice Rehnquist’s “must defer” assertion suggests and seems to lie somewhere between them; the issue of how much deference the judiciary

151. *Bush v. Gore*, 531 U.S. 98, 120 (Rehnquist, C.J., concurring).

152. POSNER, *BREAKING THE DEADLOCK*, *supra* note 2, at 100.

153. A week after Election Day, the Florida Attorney General issued an opinion reaching a conclusion similar to that of the state supreme court. 00-65 Fla. Op. Att’y Gen. (2000), *available at* [http://legal1.firn.edu/ago.nsf/\\$defaultview](http://legal1.firn.edu/ago.nsf/$defaultview). This opinion probably had no legal significance, and it may have been as motivated by partisan considerations as the Secretary of State’s interpretations. Nevertheless, it presents a powerful and persuasive argument that her conclusions were plainly wrong given the prior state of Florida law.

154. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1228 (Fla. 2000), *vacated sub nom.* *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

owes to administrative interpretations of law is as elusive in Florida law as it is in federal law.

The opinion cited by the Chief Justice said that:

[A]lthough not binding judicial precedent, advisory opinions of affected agency heads are persuasive authority and, if the construction of law in those opinions is reasonable, they are entitled to great weight in construing the law as applied to that affected agency of government.

....
 . . . [T]he judgment of officials duly charged with carrying out the election process should be presumed correct if reasonable and not in derogation of the law.¹⁵⁵

And one of the cases cited by the Florida Supreme Court repeated the principle from prior cases that the interpretation of a statute by the administrative entity charged with enforcing the statute “is entitled to great deference and should not be overturned unless clearly erroneous or in conflict with the legislative intent of the statute.”¹⁵⁶ A useful summary may be this: If a statute leaves room for a range of reasonable constructions, then the courts should ordinarily defer to a choice within that range made by the administrative entity charged with implementing the statute. A court should not impose its own interpretation unless it concludes that this interpretation is clearly superior to the one chosen by the administrative entity.¹⁵⁷ In determining the appropriate degree of deference, a valid consideration is how much the interpretation requires agency expertise.¹⁵⁸

155. *Krivanek v. Take Back Tampa Political Comm.*, 625 So. 2d 840, 844-45 (Fla. 1993).

156. *Donato v. Am. Tel. & Tel. Co.*, 767 So. 2d 1146, 1153 (Fla. 2000) (quoting *Mayo Clinic Jacksonville v. Dep’t. of Prof’l Regulation*, 625 So. 2d 918, 919 (Fla. Dist. Ct. App. 1993)); *see also* *Nikolits v. Nicosia*, 682 So. 2d 663, 666 (Fla. Dist. Ct. App. 1996) (finding deference unnecessary where administrative interpretation is “clearly erroneous”).

157. *See, e.g., Florida v. Sun Gardens Citrus, LLP*, 780 So. 2d 922, 926 (Fla. Dist. Ct. App. 2001) (“If an agency’s interpretation of its own regulation is merely one of several reasonable alternatives, it must stand even though it may not appear as reasonable as some other alternative.”) (quoting *Pan Am. World Airways, Inc. v. Florida Pub. Serv. Comm’n*, 427 So. 2d 716, 719-20 (Fla. 1983)); *Sanfriel v. Dept. of Health*, 749 So. 2d 525, 527 (Fla. Dist. Ct. App. 1999) (“So long as the agency’s interpretation ‘is within the range of possible and reasonable’ it should be affirmed.”) (quoting *Republic Media, Inc. v. Dep’t of Transp.*, 714 So. 2d 1203, 1205 (Fla. Dist. Ct. App. 1998)); *Las Olas Tower Co. v. City of Fort Lauderdale*, 742 So. 2d 308, 312 (Fla. Dist. Ct. App. 1999) (agency’s construction of a statute cannot stand if it “amounts to an unreasonable interpretation, or is clearly erroneous”); *Sec’y of State v. Milligan*, 704 So. 2d 152, 160 (Fla. Dist. Ct. App. 1997) (“[J]udicial adherence to the agency’s view is not demanded when it is contrary to the statute’s plain meaning. . . .”) (quoting *PAC for Equality v. Dep’t of State*, 542 So. 2d 459, 460 (Fla. Dist. Ct. App. 1989)).

158. *Zopf v. Singletary*, 686 So. 2d 680, 682 (Fla. Dist. Ct. App. 1996) (if “[n]othing in the wording of [the statute] requires any particular expertise for purposes of interpretation . . . [this] ‘substantially mitigates the application of the rule calling for great deference to the agency’s interpretation of the statute’”) (quoting in part *State Bd. of Optometry v. Flor-*

The Florida Supreme Court overreached somewhat when it said that the Secretary's interpretation of the "error in the vote tabulation" standard "contravenes the plain meaning" of the statute;¹⁵⁹ the statute does not *have* a plain meaning. But the court did not overreach in determining that the Secretary's interpretation was clearly wrong or at least unreasonable, and beyond the bounds within which deference was required. That interpretation, I have shown, was a clear departure from prior law and practice. Moreover, determination of where the standards for validity of a vote were to be found, in the varying instructions given to voters or in the statute itself, is an issue of law on which administrative expertise has relatively little bearing. Florida administrative law was not so crisp or confining that it demanded adherence to the Secretary's interpretations in these circumstances. *A fortiori*, failure to adhere to those interpretations—which themselves were made after the election and squarely in accordance with the Secretary's partisan interests—did not constitute a violation of the federal constitutional principle against postelection lawmaking.

In view of the closeness of the Florida count, it was plausible that a sufficient number of votes to turn the election had been validly cast, under the standard that should have governed, but not counted by the machines. That is a possibility that could not be lightly ignored. Neither Florida administrative law nor the Federal Constitution required the Florida Supreme Court to conclude that deference to the Secretary of State precluded it from taking remedial action, in accordance with the preexisting law and practice governing the administration of Florida elections, to ensure that those votes would be counted.

B. Extension of the Initial Deadline

The Florida statute is remarkably clumsy in one respect. One section says that if a county canvassing board fails to make its returns within the seven-day deadline that county "shall be ignored" by the Elections Canvassing Commission in determining the results of the election.¹⁶⁰ The immediately succeeding section provides that such results "may be ignored."¹⁶¹ Secretary Harris initially took the view that these statutes gave her no discretion to accept late returns; the

ida Soc. of Ophthalmology, 538 So. 2d 878, 885-86 (Fla. Dist. Ct. App. 1989)); *Save St. Johns River v. St. Johns River Water Mgmt. Dist.*, 623 So. 2d 1193, 1202 (Fla. Dist. Ct. App. 1993) (administrative construction entitled to great weight "when it involves a matter of agency expertise") (citing *Dep't of Admin. v. Moore*, 524 So. 2d 704 (Fla. Dist. Ct. App. 1988)).

159. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d at 1228.

160. FLA. STAT. § 102.111(1) (2000), *amended by* 2001 Fla. Laws ch. 40, § 39, at 146.

161. *Id.* § 102.112(3), *amended by* 2001 Fla. Laws ch. 40, § 40, at 147.

permissive language, she said, only referred to “unforeseen circumstances” such as a natural disaster that might make compliance impossible.¹⁶² The next day, a lower court told her that she had discretion to accept late-filed supplemental or corrective returns and could not reject them without taking account of all facts and circumstances that might affect that discretion.¹⁶³ The day after that the Secretary issued a new set of guidelines as to when the seven-day deadline might be waived. This one was more refined than the prior one—but it did not allow for recounts attributable to “voter error.”¹⁶⁴ The lower court accepted this statement as an adequate exercise of discretion;¹⁶⁵ the state supreme court did not.

At the very least, the statute on its face gave the Secretary discretion to reject late returns. Judge Posner is correct that the state supreme court decision gave her decision no deference,¹⁶⁶ as is perhaps most clearly indicated by the fact that the court effectively took over her job by laying out its own schedule for certification. Its decision is therefore open to criticism. But the defects of that decision do not amount to an Article II problem.

Bear in mind that the Secretary’s refusal to accept late recounts was based at least in part on the premise that the recounts were attempts to cover for “voter error.” That conclusion, as I have shown above, depended on a perception of law—one with which the state supreme court disagreed. The court could have written a plausible enough opinion saying that the Secretary had committed legal error in her perception of what a valid vote is; that therefore her statement of the factors bearing on whether to accept late returns did not bear accurately on the case; that given the closeness of the election, the importance of conducting manual returns to correct machine failure to count valid votes, and the difficulty of conducting those returns, adherence to the seven-day deadline would be an abuse of discretion; and that she now had to exercise her discretion, properly guided, to determine what new deadline to set. Likely the court was in no mood to act with such moderation because of time pressure and because of the appearance of partisanship that Secretary Harris had given. But

162. 00-10 Op. Div. of Elec., Letter from L. Clayton Roberts, Director, Div. of Elec. to Hon. Charles Burton, Chairperson, Palm Beach County Canvassing Bd. (Nov. 13, 2000), *available at* http://election.dos.state.fl.us/opinions/de2000/de00_10.html.

163. *McDermott v. Harris*, No. 00-2700, 2000 WL 1693713 (Fla. Leon County Ct., Nov. 14, 2000).

164. Letter from Katherine Harris, Florida Secretary of State to Hon. Charles Burton, Chairperson, Palm Beach County Canvassing Bd. (Nov. 15, 2000), *available at* <http://news.findlaw.com/cnn/docs/election2000/uscushpbccbj1129.pdf>, at 26-30.

165. *McDermott*, 2000 WL 1693713, at *1.

166. POSNER, *BREAKING THE DEADLOCK*, *supra* note 2, at 106 (“[T]he secretary of state’s decision not to delay the certification of the winner of the Presidential election deserved considerable deference; it received none from the Florida supreme court”); *see also* Posner, *Florida 2000*, *supra* note 2, at 29.

such an opinion would have made the court look less overreaching than it did and yet allowed the boards to finish their counts.

In any event, though, the court's November 21 decision to extend the boards' deadline had little impact on its December 8 decision to order a statewide recount, and it is the later decision that made the difference, because it ordered the statewide recount that was reviewed in *Bush II*. Judge Posner argues that the earlier decision was important, because it allowed Broward County to complete its recount, thus giving Gore a net gain of 393 votes, and "[t]he difference might have proved decisive in the recount that the Florida supreme court ordered on December 8 had that recount gone through to completion."¹⁶⁷ The argument is self-evidently dependent on contingencies that never occurred—the court-ordered recount never was completed, and there is no way of knowing whether the 393 votes would have been decisive. Furthermore, in light of the view that the Florida Supreme Court took of its power to order a statewide recount as part of the contest, earlier completion of the Broward recount was not a precondition for ultimately including a manual recount of that county's undervote in the statewide tally. And ironically, in that light, extension of the deadline turned out to be a Pyrrhic victory for Gore; by extending the deadline for initial certification, the state supreme court shortened the period for the contest, which if allowed to proceed to completion might have given Gore victory. In the end, it was not Bush who was hurt by the extension.

C. Rendering the Earlier Stage Meaningless

Both the Chief Justice and Judge Posner contend that the state supreme court's order of a statewide recount of the undervote during the contest phase renders the earlier certification meaningless.¹⁶⁸ As Judge Posner puts the point, the state supreme court, reversing the trial court, "ruled in effect that any doubts that might authorize a canvassing board to conduct a recount at the protest stage compel[led] the court at the contest stage to order (in fact to conduct itself or under its supervision) a hand recount."¹⁶⁹ Having set up its own schedule of deadlines for the county canvassing boards to complete their counts, the state supreme court now required a much later recount to be conducted with the courts, though lacking staff and experience, as the "primary vote tabulators." "This," says Judge Posner, "is all upside down."¹⁷⁰

167. POSNER, *BREAKING THE DEADLOCK*, *supra* note 2, at 117; *see also* Posner, *Florida 2000*, *supra* note 2, at 33.

168. *Bush v. Gore*, 531 U.S. 98, 118 (2000) (Rehnquist, C.J., concurring).

169. POSNER, *BREAKING THE DEADLOCK*, *supra* note 2, at 119.

170. *Id.* at 119; *see also* Posner, *Florida 2000*, *supra* note 2, at 34-35.

There is considerable force to the argument. As a matter of sound administrative procedure, one might expect the judicial role in the contest phase to be limited to ensuring that the canvassing boards and other election officials had not acted beyond the range of their discretion during the earlier phases of the count.

But the matter is not so simple. The protest operates county by county; only at the contest phase is a governmental entity able to view the situation statewide and order a statewide remedy.¹⁷¹ The contest statute also gives the court extremely broad remedial authority, in contrast to the rather confined authority of the county canvassing boards.¹⁷² Though the contest is an adversarial proceeding, the court is not restrained by the parties' requests for relief. Hence, the state supreme court ordered a statewide recount, a remedy that would have been essentially impossible beforehand, and one that Gore had not requested. Furthermore, all that is necessary to warrant relief in the contest phase is that "a number of legal votes sufficient to change or place in doubt the result of the election" have been rejected;¹⁷³ if more than that is required to qualify as "an error in the vote tabulation" and so justify a manual recount in the protest phase, such additional requirements do not apply during the contest.¹⁷⁴

The state supreme court's decision on December 8 did not pose a substantial danger that a candidate, knowing that he has a chance of getting relief in the contest, would essentially ignore the protest phase. Even if the protest reflected nothing more than the first of two bites at the apple, a candidate would not likely forsake that first bite. But even under the December 8 decision, the protest does have greater significance. Unless the results as shown by the certification are very close, the courts will not likely grant relief in the contest. And if the county boards have already completed a manual recount, then the December 8 decision shows that the courts are likely to accept the results of that recount.

The matter was not clear-cut. But the statewide election was extraordinarily close, and the Florida Supreme Court was operating under the reasonable premise that a punch-card ballot can be legal notwithstanding an attached chad if it bears a clear indication of the intent of the voter. The court was therefore well within bounds in reading the contest statute as requiring not merely a review of the conduct of the county canvassing boards to determine whether they had abused their discretion but a statewide remedy to determine whether uncounted but legal ballots would alter the result of the

171. FLA. STAT. § 102.168(2)-(3) (2000).

172. *Id.* § 102.168(8) (permitting circuit court judges to "provide any relief appropriate"), repealed by 2001 Fla. Laws ch. 40, § 44, at 154.

173. *Id.* at § 102.168(3)(c).

174. *Id.*

election. Article II of the Federal Constitution did not invalidate that reading.

D. Return to the Safe Harbor

The Chief Justice argued that the recount ordered by the Florida Supreme Court on December 8 “significantly departed from the statutory framework in place on November 7” because it could not be completed by December 12; thus, the recount could not be reconciled with the “legislative wish”—that is language of the per curiam decision in *Bush I*, not of any source of Florida law—to take advantage of the safe harbor offered by 3 U.S.C. § 5.¹⁷⁵

But possible loss of the safe harbor does not create a serious Article II issue. This is hardly a situation in which the state supreme court, acting after November 7, overrode prior legislation clearly adopting the December 12 deadline. On the contrary, as I have already indicated in Part VI.C, the supposed legislative wish is not expressed in the Florida election code, and it was in fact read into the Code after November 7 by the Florida Supreme Court itself.

Moreover, that court never indicated an intention to carry matters past December 12. If the recount ordered on December 8 failed to satisfy the Fourteenth Amendment, but a recount under other standards would be satisfactory, the Florida court should have had an opportunity to determine the impact of the December 12 deadline—but a decision that in these circumstances that deadline must yield could hardly be deemed a nullification of previously established law. If (contrary to the holding of *Bush II*) the recount as ordered on December 8 was constitutionally satisfactory and the difficulty lay only in the looming self-imposed deadline, then the most obvious culprit was not the state supreme court but the United States Supreme Court, which halted the recount on December 9 and therefore precluded any chance of completing the count by December 12.

E. Summary

I do not mean to argue that the decision of the Florida Supreme Court to order a statewide recount was clearly correct as a matter of Florida law. The court’s interpretation of what constituted a valid vote was quite clearly in close accordance with the prior law and practice of the state. Whether a statewide recount should have been ordered, and what the criteria for it should have been, raise additional questions. The argument that the court should have deferred to the Secretary of State’s determination that incompletely punched ballots were not legal votes is not completely implausible. People of

175. *Bush v. Gore*, 531 U.S. 98, 120, 122 (2000) (Rehnquist, C.J., concurring).

good faith may even find it persuasive, though I wonder how they could after examining the preelection law and practice of Florida. In any event, to constitute a violation of Article II it is not enough that the state supreme court's decision be wrong, or even obviously wrong and wrongheaded. It is a sad phenomenon that all the time we confront judicial decisions that meet those descriptions. Such is the law, such is life. For a postelection judicial decision to constitute a violation of Article II, it must be a substantial and clearly unjustifiable alteration of law that was established before Election Day. The decision of the Florida Supreme Court does not come close to meeting that description.

VII. HOW THE MATTER SHOULD HAVE BEEN DECIDED

I have discussed the merits of the Article II argument. But I believe the Court never should have reached them. It never should have taken the case; instead, it should have left the matter to the political process prescribed by the Twelfth Amendment and by federal statute.¹⁷⁶ Given that it did take the case, the Court should have held the Article II issue nonjusticiable, a matter committed to Congress in the process of counting the electoral vote pursuant to the Twelfth Amendment. And even if it did reach the merits of the Article II issue, the availability of the political process should have informed its decision, counseling it that relatively light scrutiny was appropriate because Congressional review was available.

A. Justiciability

An argument of nonjusticiability must confront *McPherson v. Blacker*.¹⁷⁷ There, the Court rejected an Article II challenge to Michigan's old system of electing electors by districts, and as a prelude to doing so it held that the matter was justiciable, not a political question.¹⁷⁸ The Court spoke in very broad terms, saying that,

the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising, since the validity of the state

176. Testifying before a House subcommittee, Justice Thomas later said, "If there was a way, and I speak only for myself, to have avoided getting involved in that difficult decision . . . I would have done it." Charles Lane, *2 Justices Defend Court's Intervention in Fla. Dispute*, WASH. POST, Mar. 30, 2001, at A13. Actually, there was quite an easy way for the Court to have "avoided getting involved"—by not treating Governor Bush's emergency application for a stay as a petition for certiorari and granting it. See *Bush v. Gore*, 531 U.S. at 129 ("The Court should not have reviewed either [*Bush I*] or this case . . .") (Souter, J., dissenting); *id.* at 144 ("The Court was wrong to take this case.") (Breyer, J., dissenting).

177. 146 U.S. 1 (1892).

178. *Id.* at 23.

law was drawn in question as repugnant to such constitution and laws, and its validity was sustained.¹⁷⁹

But whatever the merits of the *McPherson* decision, the situation there was altogether different from that confronting the Court in *Bush II*.

In *McPherson*, the challenge concerned the state's basic system for selecting electors and reached the Court before the election. Thus, in contrast to the 2000 case, the Court did not thrust itself into a contest concerning an election already held. To a considerable extent, then, the Court was able to operate behind a veil of ignorance, deciding in the abstract what an acceptable system of selection was rather than arbitrating the standards for determining who actually won an election. This was a more seemingly judicial function—one less likely to seem like an intrusion into politics.

More significantly, the timing factor affects the need for judicial intervention. Suppose Michigan's system for selecting electors violated Article II. It would be a democratic disaster if the state held its election under that system and then Congress, in counting the electoral votes, determined that the state had not made a valid selection of electors and therefore its votes could not be counted. But before the election there would be no practical way of ensuring a congressional decision, and even if Congress made such a decision it would have dubious force. A decision by the Supreme Court was the only feasible method of reviewing Michigan's system for compliance with Article II.¹⁸⁰

Now compare the situation in Florida in 2000. The election had already been held in accordance with the statutory plan established by the Florida Legislature. The only dispute was over the results of that election. No judicial intervention was necessary to ensure that a federal authority would have the opportunity to determine the federal issues related to that dispute. Whether Florida definitively resolved the dispute or not, and whether its attempts at resolution were constrained by the Supreme Court or not, all purported certificates reciting its electoral votes would be transmitted pursuant to

179. *Id.*

180. The Secretary of State in *McPherson* argued that the matter was not justiciable in part because any decision of the Supreme Court was subject to political review, ultimately in Congress. *Id.* The Court did not respond squarely to this argument. It is true that theoretically Congress might have disagreed with the Court's decision holding the system for selection of electors valid, and at least arguably Congress would not be bound by that decision. But if the Court held the system invalid and enjoined it, then no electors would be chosen under that system and there would be nothing for Congress to review. In other words, though the Court's decision could not altogether eliminate the possibility that the state would elect a slate of electors that Congress would later determine to be invalid, it could at least narrow that possibility and do so in a way not subject to congressional review.

the Twelfth Amendment to Washington, D.C., and directed to the President of the Senate. That Amendment further directs, “[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.”¹⁸¹

Note that the Amendment—which in this respect is substantially identical to the original Article II—does *not* say that the certificates shall be directed to the Chief Justice of the United States, and that the Chief Justice shall open them in the presence of the Supreme Court and they shall then be counted. The constitutional decision to repose the responsibility for counting the vote within the national legislature rather than with the judiciary was not adventitious. It seems plain that this is “a textually demonstrable constitutional commitment of the issue to a coordinate political department,” supporting the conclusion that the matter was a nonjusticiable political question.¹⁸²

Certainly Congress has always understood that the sole responsibility for determining the electoral vote is lodged within it. The crisis of 1876-77 was attributable in large part to the fact that the Twelfth Amendment is ambiguous about exactly where the power to count the vote for the Presidency is lodged—in the President of the Senate, in the two Houses acting concurrently, in the two Houses acting as one body, or in the House of Representatives alone. But there does not seem to have been any serious thought that the power rested outside Congress, or that the Supreme Court should decide the various disputes over the credentials of state electors.¹⁸³ As the House committee reporting the bill that eventually became the Electoral Count Act of 1887 said,

The two Houses are, by the Constitution, authorized to make the count of electoral votes. They can only count legal votes, and in doing so must determine, from the best evidence to be had, what are

181. U.S. CONST. amend. XII.

182. *Baker v. Carr*, 369 U.S. 186, 217 (1962). Thus, I do not believe the justiciability issue is much affected whether the substantive argument is phrased in terms of due process or Article II. In either case, the objection is postelection lawmaking, and in either case its resolution is committed—in the context of a presidential election—to Congress. But even assuming the due process claim was justiciable, the prudential reasons counseling against Supreme Court intervention apply as fully to it as to the Article II claim.

183. Five members of the Court did sit on the Electoral Commission that helped to solve the crisis by rendering presumptive decisions in the cases of challenged electors. That Commission, however, was a creation of Congress, the other ten of its members were members of Congress, it only acted on matters referred to it under the terms of the statute, and the two Houses of Congress reserved the power, acting concurrently, to overrule the Commission's decisions.

legal votes. . . . The power to determine rests with the two houses, and there is no other constitutional tribunal.¹⁸⁴

By 2000, though, the Supreme Court seems to have concluded that only it could save the nation from chaos, and Judge Posner agrees.¹⁸⁵ Both the constitutional commitment to Congress and the statutory mechanism created by the 1887 Act remain in place—but the Court had too little faith in them to allow them to work.

B. The Statutory Framework

Congress passed the Electoral Count Act¹⁸⁶ to try to ensure that it could resolve future crises in a more orderly way. It is instructive to examine how the Act operates in general and would have operated in this presidential election had the Supreme Court not shut the process down; thus we may find the path that the Supreme Court cut off. The wording and structure of the statute are muddy, but its basic operation is clear enough.

Most often, the statute operates under one basic rule: If there is just one return from a state, its electors have been lawfully certified, and the votes were “regularly given” by the electors, then those votes may not be rejected; the two Houses may, however, reject votes, even if those votes are the only ones from the state, if the Houses agree that the votes were not regularly given by electors whose votes have been lawfully certified.¹⁸⁷

If there are multiple returns, a more complicated set of rules comes into play. First, the “safe harbor” provision of 3 U.S.C. § 5 may apply: If the state has provided, by laws enacted prior to Election Day, “for its final determination of any controversy or contest concerning the appointment of . . . electors, . . . by judicial or other methods or procedures,” and that determination is made at least six days prior to the date prescribed for the electors to meet, then that determination “shall be conclusive . . . in the counting of the electoral votes.”¹⁸⁸

184. H.R. REP. NO. 49-1638, at 2 (1886) (report submitted by Rep. Caldwell, Select Committee on the Election of President and Vice President), *quoted in* Bush v. Gore, 531 U.S. 98, 154 (2000) (Breyer, J., dissenting).

185. He asks:

[W]hat exactly is the Supreme Court good for if it refuses to examine a likely constitutional error that if uncorrected may engender a national crisis? We might call this the reverse political questions doctrine. Political considerations in a broad, nonpartisan sense will sometimes counsel the Court to abstain, but sometimes to intervene.

POSNER, BREAKING THE DEADLOCK, *supra* note 2, at 162; Posner, *Florida 2000*, *supra* note 2, at 53.

186. 3 U.S.C. § 15 (1994).

187. *Id.*

188. *Id.* § 5.

The statute further provides for the contingency in which “there shall arise the question which of two or more . . . authorities . . . is the lawful tribunal” of the state designated by § 5.¹⁸⁹ In that case if the two Houses, voting separately, concurrently decide that the validity of one slate “is supported by the decision of such State so authorized by its law,” then the votes of that slate shall be counted.¹⁹⁰

But if there has not been a § 5 determination—and presumably if competing tribunals claim to have made a § 5 determination but the Houses do not agree on one—then the votes shall be counted of a slate that the two Houses agree “were cast by lawful electors appointed in accordance with the laws of the State”; provided, however, that even though the Houses agree that the slate was lawfully appointed, they might agree that their votes were not regularly given, in which case the votes should not be counted.¹⁹¹ Finally, if the two Houses fail to agree as to which slate was lawfully appointed, then the default rule is that “the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.”¹⁹²

This complex procedure may seem to invite endless wrangling; that prospect is a concern raised by Judge Posner.¹⁹³ In fact, however, the statute provides tight time limits designed to ensure that the count will be brought to a prompt conclusion.¹⁹⁴

C. *Constitutionality of the Statutory Framework*

I will not dwell long on the question of whether the statutory framework I have just outlined is constitutional. It seems to me that a constitutional challenge almost certainly would have failed.

As noted above, Congress passed the Electoral Count Act in the wake of the crisis of 1876-77, and with the hopes of preventing a similar crisis and confusion of the type that had arisen in prior instances of dispute electoral votes. The Act operated in the context of bare-bones and relatively uninformative constitutional language that had proven inadequate to the task. In a moment of relative political quiet—operating behind a veil of ignorance—Congress adopted a

189. *Id.* § 15.

190. *Id.*

191. *Id.* The statute is uninformative as to the meaning of “regularly given.” I assume, for example, that votes, although cast by lawfully appointed electors, would not be regularly given if they were not cast on the date designated by law, or if they were cast outside a meeting held within the state as required by the Twelfth Amendment.

192. *Id.*

193. POSNER, BREAKING THE DEADLOCK, *supra* note 2, at 137-41; Posner, *Florida 2000*, *supra* note 2, at 44-45. Among other points, Judge Posner suggests that a battle in Congress might have resulted in Strom Thurmond or Lawrence Summers acting as President.

194. 3 U.S.C. §§ 17, 18 (1994).

procedure designed to elaborate on the constitutionally prescribed processes and minimize the probability of future difficulties.

It was entirely fitting for Congress to do this. Not only is Congress the national legislature, but the power in question—the power to decide which electoral votes shall be counted—clearly resides within Congress itself. Occasionally, the President of the Senate had asserted the power, because it is he who is constitutionally designated to receive and open the returns, but that argument seems flimsy. More likely it is the House of Representatives, because the House chooses the President if no candidate receives a majority of electoral votes, or the two Houses concurrently, because it is in front of both that the electoral votes are opened, or conceivably the two Houses deemed to be acting as one body, on a one-member, one-vote basis. In passing the statute, then, Congress was allocating within itself¹⁹⁵ power that belonged to it but the constitutional allocation of which was unclear.

Perhaps one might argue that, Congress not having been given an explicit grant of authority to fill in the rules governing the electoral count, any elaboration on the constitutional procedures should be by constitutional amendment. But the argument is unpersuasive. The nation should not have to reach constitutional agreement on the fine-grained mechanical issues addressed by the Electoral Count Act. To say that, absent a constitutional amendment, there can be no law clarifying the allocation of power in conducting the electoral count is to abandon serious hope of adopting any such law. And even if a constitutional amendment would be practical and preferable, a decisionmaker—especially a pragmatic decisionmaker of the type Judge Posner praises—in the midst of a crisis would have to consider the simple fact that the nation has *not* adopted such an amendment. If a live electoral dispute had gone to Congress in 2000 and the dispute were to be resolved according to rules previously prescribed, then those rules would have to be the ones laid out long before by the Electoral Count Act. It was the only rule book in town.

Furthermore, the Act has, for over a century, governed routine electoral counts without any dispute as to its constitutionality. Such accretions of authority in undisputed cases must count for something when the Act is finally put to the test in a disputed case.

In any event, it was always highly unlikely that the 2000 election dispute would yield a judicial decision that the Act is unconstitutional. As Judge Posner suggests, the Supreme Court presumably would have held a challenge to the Act—an attempt to restrain Congress in conducting the constitutionally prescribed count—

195. The statute, like all federal statutes, was presented to the President, but I do not believe that materially altered the situation.

nonjusticiable. It is possible that some members of Congress would have contended in debate that the Act is unconstitutional, or that it only carries the force of rules of the two Houses, and so could be disregarded by one House or the other. But such a contention would have appeared transparently to be an attempt to change the rules in the middle of the game, and it would have entailed a steep political price.

I will therefore assume that the process prescribed by the Electoral Count Act is constitutional and would have been generally regarded as binding had the dispute continued into Congress. Now let us see how this process might have worked in the 2000 election. I will run through it under two alternative counterfactual assumptions.

D. If There Had Been a § 5 Determination

First, suppose that the Court decided not to review the Florida Supreme Court's decision of December 8, and that the statewide recounts and the contest proceeding of which they were a part were concluded by December 12. Then, pursuant to 3 U.S.C. § 5, the determination made by the Florida court at the conclusion of that proceeding should have been conclusive in the count of the electoral vote.

If the court had determined that Bush was the winner, presumably there would have been no problem—he would have received Florida's electoral votes, and the Presidency, without further dispute. But how much more satisfying an outcome that would have been—the recount ordered by the state supreme court completed without federal interference and the election awarded to the winner of that count—than the one we have.

If the court had determined that Gore was the winner, however, that likely would not have been the end of the story. If the legislature had gotten into the act by designating its own slate, that should not have had any impact; as I have shown in Part II, the legislature had no postelection authority to designate a slate. Presumably, though, the Governor, Jeb Bush, the Republican candidate's brother, would not have altered certification of the Republican slate even if the state supreme court ordered him to do so; in a functional family, spending a few weeks in jail is probably a reasonable price to pay to give your brother a good chance for the Presidency. That court would not have had to play a game of chicken, however. It could have reached its final determination and, relying on § 5, sent certification of that determination to Washington. Thus, two competing returns would be opened in Congress, one of a slate certified by the Governor and the other supported by what purported to be a § 5 determination.

Now, Republicans in Congress may have resisted the conclusion that the final judgment of the state supreme court was a determination satisfying § 5. Recall that as of January 6, 2001, while the Democrats had the narrowest of edges in the Senate—with the President of the Senate, Al Gore himself, in position to break a 50-50 tie—the Republicans had a slightly larger edge in the House. House Republicans would have had the incentive to deny § 5 treatment to the determination by the state supreme court, because eventually that would have meant that the default rule, counting the slate certified under seal by the Governor, would apply. Republicans may thus have contended, for reasons addressed in Part VI, that the court's decision did not accord with preexisting law. And, for reasons similar to those I have presented in Part VI, such a contention would not have been sound on the merits. Apart from that, however, Congress should not have reached the merits of that contention, or if it did it should have considered them with a thumb heavily on the side of the scale favoring legitimacy of the state supreme court's decision.

To see this, it is helpful to understand the basic nature of § 5. This provision is not addressed in general to a state's postelection counting procedure. Rather, it is addressed to the state's procedure for its "final determination of any controversy or contest concerning the appointment of" the state's electors.¹⁹⁶ Failure to appreciate that distorted much of the discussion during the election affair, including the opinion of the United States Supreme Court in *Bush I*. The statute presupposes a "controversy or contest" and tells the state that if it provides a method for "final determination" of that dispute, and that determination is made at least six days before the electors vote, then the determination will be conclusive in Congress's counting of the electoral vote.¹⁹⁷ The county-by-county administrative protests pursuant to section 102.166 of Florida's election code that were on review in *Bush I* cannot be that "final determination"; indeed, at that point, no "contest or controversy" had ripened concerning appointment of the state's electors, because no statewide authority had certified a winner. It is clear that the "final determination" of the "contest or controversy" is not made under Florida law by an administrative protest. Rather, it is made by the judicial procedure established by section 102.168, which is even explicitly termed a "contest," which begins only after an administrative certification is made, and which is the state's last word on who won the election.¹⁹⁸

196. 3 U.S.C. § 5 (1994).

197. *Id.*

198. Nevertheless, in *Bush I*, the Supreme Court strongly suggested that "a legislative wish to take advantage of the 'safe harbor' would counsel against any construction of the Election Code that Congress might deem to be a change in the law." *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000). But section 5 does not call into question

The idea behind § 5, then, is that *if* there arises a “contest or controversy” that may result in multiple slates of electors voting, but the state makes a timely “final determination” of the controversy in accordance with a previously established procedure, the state will then be treated as a black box; even if multiple slates do vote, Congress will not look behind that determination but will accept its results. Given this, it does not make sense for Congress to be persnickety about whether the precise procedure used by the tribunal or the substantive result that it reaches is in accordance with state law. Note that § 15 provides an explicit procedure for Congress to determine “which of two or more . . . authorities . . . is the lawful tribunal” for purposes of § 5.¹⁹⁹ But it does not provide an explicit procedure for Congress to determine that the procedures followed by what is conceded the “lawful tribunal”—the state supreme court in this case—or the result reached by it do not square with state law. As did the Electoral Commission in 1877, Congress no doubt realized that it is an unfortunate result if Congress itself has to resolve questions of state law in determining the electoral vote. “Pick your final decisionmaker,” Congress effectively told the states in the 1887 Act, “and if it comes up with a timely decision we will not look behind its determination.” Not a mere black box can the state become, but one with a very hard casing.

Thus, for example, Congress should not decide that the state contest-resolution procedure fails to qualify under § 5 because the court previously shortened the time for it by extending the earlier administrative phase of the dispute. This does not necessarily mean that, if the designated tribunal were effectively to select electors itself without regard to the procedure established by the legislature before the election, Congress would be powerless to do anything about it. At some point, Congress might conclude that the tribunal had acted in so lawless a way that the result it produced should be considered not a determination of the contest but rather a coup. But plainly this conclusion would be warranted only in extreme cases—and nothing the Florida Supreme Court did after the 2000 election, or was likely to do if the recounts continued, was so extreme.

This seems an appropriate structure for decision, for as I have indicated in Part V in discussing the structure of an Article II claim, only in extreme cases should the decision of the state tribunal pose a constitutional problem. Perhaps, though, the statute should be construed not to give Congress the power to break into the black box at

“any construction of the Election Code” that might be deemed a change in law. It only applies to the proceeding established for final resolution of a contest, and that proceeding was not on review in *Bush I*.

199. 3 U.S.C. § 15 (1994).

all and reject a decision made by the designated tribunal. That is not particularly troublesome as a constitutional matter. Ultimately, if civil order is to be maintained, there must be some entity whose determination of the results of a state's election is conclusive, and we must hope that that entity will perform its duty and not exercise its power lawlessly. State judges are bound to follow the Constitution.²⁰⁰ The determination of the results of a state's election depends principally, if not exclusively, on determinations of state law. It makes perfect sense for Congress, in exercising its power of counting the electoral vote, to devolve the authority to resolve a contest in a given state upon the tribunal designated by that state.

Whether such arguments would have carried the day in Congress it is hard to say. But they would have had legal force, and that would have created political force. Perhaps in the end, notwithstanding the results of the recount and its certification by the state supreme court, House Republicans would have denied § 5 treatment to that certification. George W. Bush would still have been elected President, and the result would still have appeared to many, as it did in the actual event, to be a usurpation of power. But at least it would have been an exercise of power taken in the face of, rather than precluding, the recount, and it would have been effected by members of the government acting without any pretense that they were not politicians.

E. Recounts Without a § 5 Determination

Now suppose that the recount had been completed, but not in time for a resolution under § 5. This might have occurred if the Supreme Court had never stopped the recount, either because it declined to take *Bush II* on review or because it never issued a stay, but the state failed to meet the December 12 deadline. Or, bringing the case closer to the actual events, it could have occurred if the Court remanded the case to the state supreme court and allowed the recount to continue under standards that the Court deemed constitutionally appropriate.

Once again, if Bush had won the recount under judicial supervision, that presumably would have been the end of the matter. And once again, that would have been a satisfying result. Democrats could not complain about judicial usurpation if the recount they had sought showed their ticket to be a loser.

Again, the more interesting and complex case is the one in which Gore wins the recount. Again, I assume that in this case there would have been competing certificates presented to Congress, one for Republican electors under seal by the Governor, and another for De-

200. U.S. CONST. art. VI.

mocratic electors from the state supreme court, in addition, perhaps, to an illegitimate certificate for a Republican slate from the legislature. But now by hypothesis the judicial certificate would not satisfy the safe harbor of § 5, and Congress would have no legal compulsion to accept it. Now the Republicans would have a clear advantage, for if the two Houses did not agree that one slate was the legitimate one, the default provision would apply in favor of the slate certified by the Governor.

But the result would not have been open and shut. Suppose the recount was widely perceived to be fair, and that it revealed a fairly substantial margin in favor of the Democratic ticket—say a few thousand votes rather than dozens or hundreds. Then, especially in light of the fact that the Democrats won the popular vote nationwide, there might have been substantial pressure on some Republican members of the House, particularly those from marginal districts, to accept the results of the recount. It would only have taken a small handful of crossover votes to elect the Gore-Lieberman ticket. Perhaps even those few votes would not have been forthcoming. Which ever way the proceedings in Congress turned out, however, our President and Vice President would have been elected as they always have been—by open politics.

CONCLUSION

Judge Posner contends that “Congress is not a competent forum for resolving such disputes” as the one over Florida’s electoral votes.²⁰¹ He recognizes that resolving conflicts is much of what legislatures are all about, but he says that “disputes over the lawfulness of competing slates of Presidential electors call for legal-type judgments rather than for raw exercises of political power.”²⁰² Several responses are appropriate.

First, it is not self-evident that *Bush v. Gore* was *not* a raw exercise of political power. Second, given that Judge Posner defends *Bush v. Gore* not as a clearly correct legal decision but as a pragmatic act of judicial statesmanship, his contention that because of its legal nature the decision ought to have resided in the judiciary of the issues is quite ironic. Third, that Congress is a political and highly partisan body does not mean it is incapable of following rules. Congress’s own procedures are controlled by elaborate procedural rules. If either party had sought a departure from the rules laid out more than a century ago for resolution of disputes over electors, it would have paid a heavy price. Fourth, in some cases the resolution of a dispute over electors is rather clear as a matter of law. But in others it is not,

201. POSNER, BREAKING THE DEADLOCK, *supra* note 2, at 145.

202. *Id.*

and so ultimately it is probably better, when a presidential election depends on such disputes, that they be resolved by openly political actors. Finally, for better or worse, Congress is clearly the forum that the Constitution chose to resolve these disputes.

It was five weeks after Election Day when the Supreme Court brought the dispute to a close. Had the political process prescribed by the Constitution and by federal law been allowed to run its course, the dispute might (depending on the result of the recount) have gone on another three and a half weeks, perhaps a little more. The transition period, after the clear emergence of a winner, might have been reduced to two weeks, perhaps even less. That surely would have been a cost of continuing with the process. But it would not have compared to the cost to democracy that we actually incurred, in which our highest court, at some presumed loss to its own credibility, halted the prescribed process for determining the electoral votes and effectively declared the contest over.

Perhaps such a cost would be worthwhile if it were truly necessary to maintain order and unity. But there is no warrant for concluding that chaos was threatened if the matter had remained in doubt for a few more weeks. The Constitution and federal statute provide a political process for counting the electoral vote, because the selection of the President and the Vice President is a quintessentially political function. Had the process continued, it would have been highly contentious and partisan, and even bitter, but it would not have led to bloodshed or secession or even a delay in inauguration. The culmination of that process occurs in Congress, the national legislature. Each state is given an opportunity to resolve its own disputes, and the state may choose, as Florida has done, to make its supreme court the ultimate tribunal for that resolution. But the United States Supreme Court has at most a peripheral role in the process, and not one explicitly provided by Article II, the Twelfth Amendment, or by statute. If a state genuinely discriminates against some of its voters, the Court's intervention might be warranted. But the Court must be extremely careful, lest it usurp the functions of the voters, of the states, and of the Congress.

In this case, the Court's intervention was unjustified. We should recognize that manual recounts under subjective standards are troubling, even if state law calls for them. And it is easy enough to see how an observer, particularly one hoping for a Republican victory, would conclude that the state supreme court overreached its authority and gave insufficient deference to the Secretary of State. But that court was the designated tribunal for providing the state's resolution of the contest over its electoral votes and, even assuming that the Supreme Court had any power of review at all over the state court's determinations, that power should be reserved for egregious cases.

That description does not come close to fitting the state court's attempt, in accordance with prior law, to count ballots that bore a clear indication of voter intent but were not counted by machine.

I continue, then, to believe that the decision in *Bush v. Gore* was a terrible mistake, an unsupportable intrusion into our democracy. Confronted with the contrary conclusion of observers like Judge Posner, I am compelled to conclude that, strongly held as one's views on this case may be, it is possible for others, approaching the matter from a different perspective, to reach a decision that may appear wrongheaded and unsupportable, but to do so in good faith. Thus, all one can do is acknowledge the authority of those in a position to decide the matter definitively and live with the result. But I cannot forget that this is precisely the attitude that the Supreme Court should have taken in this case. And so I still find it hard to make a full peace with *Bush v. Gore*.